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The Commodification of Nature's Metropolis: The Historical Context of Illinois' Unique Zoning Standards

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ARTICLES

The Commodification of "Nature's Metropolis": The Historical Context of Illinois' Unique Zoning Standards

FRED P. BOSSELMAN*

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I. INTRODUCTION

A. DISMAL READING

The Illinois courts regularly use a set of criteria known as the "*LaSalle Bank* standards" to analyze the validity of zoning ordinances as applied to individual properties. These standards are as follows:

[A]mong the facts which may be taken into consideration in determining validity of an ordinance are the following: (1) The existing uses and zoning of nearby property, (2) the extent to which property values are diminished by the particular zoning restrictions, (3) the extent to which the destruction of property values of plaintiff promotes the health, safety, morals and general welfare of the public, (4) the relative gain to the public as compared to the hardship imposed upon the individual property owner, (5) the suitability of the subject property for the zoned purposes, and (6) the length of time the property has been vacant as zoned considered in the context of land development in the area of the vicinity of the subject property.¹

The repeated application of these standards in dozens of reported decisions is a unique feature of Illinois zoning law not found in other states.² Cases from other states can be found in which each of these factors are cited by a court in a zoning case, but in no other state is this list (or any other list) of factual issues methodically analyzed by the court in each zoning case.³

"Because of the great emphasis on the importance of nearby land use, the Illinois cases make dismal reading," says Norman Williams in his comparative analysis of the zoning law of the major states. Illinois cases normally begin with a page or two reciting the specific land uses nearby, he points out, characterizing the existence of so

1. *LaSalle Nat'l Bank v. Cook County*, 145 N.E.2d 65, 69 (Ill. 1957) (citations omitted). Some cases say factor 1 is "paramount." *Amalgamated Trust & Savings Bank v. Cook County*, 402 N.E.2d 719, 728 (Ill. App. Ct. 1980). In addition, the court sometimes considers additional factors. See *Sinclair Pipeline Co. v. Village of Richton Park*, 167 N.E.2d 406 (Ill. 1960).

2. NORMAN WILLIAMS, JR., *AMERICAN LAND PLANNING LAW* 216 (Rev. ed. 1988).

3. "Zoning case" as used herein refers to cases challenging the substantive validity of zoning as applied to individual properties. It excludes many cases involving zoning that are decided on procedural issues.

many fact-sensitive criteria as "a situation analogous to a grab bag."⁴

"Two rules are really important in Illinois," says Williams:

First, in deciding on the validity of mapping, the primary factor is the adjacent land uses: is this a homogenous area conforming to the applicable zoning regulations? . . . Second, a large group of cases have held that, if the effect of zoning regulations is to reduce substantially the value of a tract the burden shifts to the local government to justify the zoning.⁵

Other commentators have agreed that the Illinois courts put primary emphasis on these two issues.⁶

For purposes of this article these issues can be restated as two policy axioms: (1) neighborhoods should contain a uniform type of land use, and (2) zoning should not normally cause a substantial reduction in property values.⁷

The Illinois courts have rarely sought to enlighten us on the source of these policies. An unusual aspect of Illinois law is that these policies are judicially enforced without citation to authority other than the long string of cases in which they have previously been cited. Do they have a constitutional basis? If so, is it state or federal? Are they statutory in origin? If so, should they still be applied to home rule communities? Or is this some sort of common law drift that has lost its moorings?⁸

One way to provide a basis for an answer to these questions is to explore the historical context in which Illinois zoning law developed

4. WILLIAMS, *supra* note 2, at 219.

5. *Id.* at 217. For an argument that this shift of burden is now becoming a national trend, see Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1 (1992).

6. See ROBERT M. ANDERSON, *AMERICAN LAW OF ZONING* 143, 189 (3d ed. 1980).

7. Of the listed *LaSalle Bank* factors, numbers 1 and 5 relate to the first axiom and numbers 2, 3 and 4 relate to the second axiom. Number 6 is of relatively minor importance and has less frequently been used as a basis for decisions.

8. See *First Nat'l Bank & Trust Co. v. City of Evanston*, 197 N.E.2d 705 (Ill. 1964), in which the court leaves open the question of the extent to which the *LaSalle Bank* standards are constitutional or statutory. Fred P. Bosselman, *Substantial Constitutional Questions: Are Zoning Cases Sui Generis?*, 54 ILL. B.J. 752 (1965); see Richard F. Babcock, *The Unhappy State of Zoning Administration in Illinois*, 26 U. CHI. L. REV. 509, 532-33 (1959). If the *LaSalle Bank* standards were held to be statutorily based, a question would arise as to their continuing applicability to home rule communities. See *Thompson v. Cook County Zoning Board of Appeals*, 421 N.E.2d 285 (Ill. App. Ct. 1981).

to see whether it sheds light on the continuing relevance of the *LaSalle Bank* standards.

B. NATURE'S METROPOLIS

A recent history of Chicago provides a useful takeoff point for such an analysis. Yale history professor William Cronon recently won the Bancroft and Heartland prizes for his book *Nature's Metropolis: Chicago and the Great West*.⁹ The book traces the development of Chicago's economy during the nineteenth century. A number of the book's overall themes provide a useful point of departure for a more detailed look at the historical events that influenced Illinois zoning in particular.

Cronon first emphasizes that the rapid and successful growth of Chicago's economy in the nineteenth century was dependent on a close interrelationship between the city and the surrounding midwestern countryside — the "great west" as it was called by early nineteenth century Americans. The products of this land, particularly grains, lumber and meat, gave Chicago's economy its start, and the people living on that land provided its primary market. Chicago's history cannot be understood except as a part of the history of the midwest.¹⁰

Second, Chicago's economic growth in the nineteenth century resulted primarily from its ability to convert the products of the land to commodities that could be traded in abstract, conceptual quantities free from the need for detailed inspection of the goods themselves. "The idea that resources could be commodified was fully developed into a science in Chicago, as the commodity exchanges that still play a major role in Chicago's economy bear witness."¹¹

Third, the process of commodification of resources created a system in which the specific land from which the resources were derived became as irrelevant as the color of the cow. One ironic example he cites is the decision of Chicago corporations to close the Chicago stockyards when it became more convenient to process meat elsewhere:

9. WILLIAM CRONON, *NATURE'S METROPOLIS* (1991).

10. Despite his midwestern upbringing, Professor Cronon has now adopted the eastern term "middle west" instead of midwest. William Cronon et al., *Becoming West: Toward a New Meaning for Western History* (hereinafter Cronon, *Becoming West*), in UNDER AN OPEN SKY (Cronon et al. eds., 1992). At various times and for various purposes the "great west" described by Cronon extended to the Canadian-border and the Rocky mountains, but in any event included northern and central Illinois, Iowa and much of Wisconsin. For another work by Cronon, see WILLIAM CRONON, *CHANGES IN THE LAND* (1983).

11. CRONON, *supra* note 9, at 340.

Once within the corporate system, places lost their particularity and became functional abstractions on organizational charts. Geography no longer mattered very much except as a problem in management: time had conspired with capital to annihilate space. The cattle might still graze amid forgotten buffalo wallows in central Montana, and the hogs might still devour their feedlot corn in Iowa, but from the corporate point of view they could just as well have been anywhere else. Abstract, standardized and fungible, their lives were governed as much by the nature of capital as by the nature that gave them life. It was perhaps nothing more than simple justice that the city which had remade them in this way should be subject to the same alchemy. In losing control of its corporate meat-packing hinterland, Chicago's stockyard fulfilled the logic of its own birth.¹²

It is the thesis of this article that many aspects of nineteenth century Illinois history caused its residents to view land itself simply as another form of capital that could be made "abstract, standardized and fungible" through an "alchemy" of commodification. This history influenced an unusual theory of urban growth that was prevalent in Chicago at the time that zoning was initially adopted. This theory postulated that urban growth consisted of the deterministic movements of neighborhoods called "natural areas" in a manner analogous to the processes of invasion and succession in plant ecology. The proponents of this theory called it "human ecology." In their analysis of the movements of neighborhoods, the Illinois landscape itself was merely a checkerboard on which the game was played, each square similar to every other square. The premises of "human ecology" became embodied in the Illinois zoning statute and eventually became the basis for the *LaSalle Bank* standards by which the courts served as the scorekeeper in determining whether zoning was faithfully following these natural laws of neighborhoods. In this way the residents of "Nature's Metropolis" succeeded in commodifying nature's metropolis itself.

Part II of this article summarizes the historical geography of Illinois, which provided the physical environment in which the zoning game was played. Part III discusses aspects of Chicago's history that encouraged certain ways of thinking about urban growth. Part IV examines the ideas about the development of cities that were prevalent in the late nineteenth and early twentieth centuries. Part V looks at

12. *Id.* at 259.

the way those ideas were incorporated into Illinois zoning law.

II. PRAIRIE SALE

A. THE SQUARE DEAL

The context of the law relating to land in Illinois was established on May 20, 1785, by the passage of the "Land Ordinance"¹³ governing the settlement of the so-called Northwest Territories. These territories, which encompassed the land we now call the "midwest," were ceded by the states to the federal government at the time of independence, and included most of the present states of Ohio, Indiana, Illinois, Michigan and Wisconsin.¹⁴

When the revolutionary war ended the new federal government inherited heavy debts and few liquid assets. To pay these debts the government proposed to sell its land in the midwest.¹⁵ This brought about extensive debate among four major groups: the creditors, who sought quick repayment; potential speculators, who sought capital appreciation; existing settlers, who sought confirmation of titles obtained from Indian tribes; and potential settlers, who sought clear titles and low prices. Further complicating the debate was the continuing friction between slave states and free states. Should the plantation become the ideal of western settlement? Or should broadly-based individual ownership of small farms be encouraged?¹⁶

The sheer numbers of war veterans restive for a chance to move west ensured that the desire of settlers for clear title to small farms would prevail, though not without substantial compromise with influential speculators.¹⁷ Pressure from both the creditors and potential

13. The 1785 law was followed by almost annual revisions as the Congress sought to refine the method for settling these territories over the next decades. See generally MALCOLM J. ROHRBOUGH, *LAND OFFICE BUSINESS* (1990).

14. JOHN R. STILGOE, *COMMON LANDSCAPE OF AMERICA, 1580 TO 1845*, at 99 (1982).

15. ROHRBOUGH, *supra* note 13, at 10-11; STILGOE, *supra* note 14, at 102; Richard N.L. Andrews, *Land in America, a Brief History*, in *LAND IN AMERICA, COMMODITY OR NATURAL RESOURCE?* 34 (Richard N.L. Andrews ed., 1979).

16. HENRY N. SMITH, *VIRGIN LAND* 161-62 (1949). For a modern study of the political process of interest group bargaining for rights to public lands, see GARY D. LIBECAP, *CONTRACTING FOR PROPERTY RIGHTS* (1989).

17. Congress passed statutes in 1811 and 1812 awarding 160 acres of land to every soldier who fought in the war. E.J. WHITEHEAD, *THE LAW OF REAL PROPERTY IN ILLINOIS* 128-35 (1922); see also DANA L. THOMAS, *LORDS OF THE LAND* 16-19 (1977); I CHARLES A. BEARD & MARY R. BEARD, *THE RISE OF AMERICAN CIVILIZATION*

settlers brought a resolution of the complex policy debate in the adoption of a series of public land laws passed between 1785 and the early 1800's.¹⁸

These laws authorized the commencement of the most extensive land survey the country had ever seen. The lands of the Northwest Territories were to be divided into square units according to a system of sections, townships and ranges. This huge grid was to encompass all of the land between the Ohio and Mississippi Rivers, and to provide the geographic pattern that would shape the attitude toward land of all those who came to occupy the midwest. It had been created to expedite sales and to be receptive to all potential users of the land, but the grid eventually provided the common elements that made the landscape seem welcoming and familiar.¹⁹

The public land laws directed the land office to offer land for sale at auction in units suitable for settlement by a single family. The size of these units grew smaller over the next few decades as settlers pressured Congress to make it possible for more small farmers to acquire land without help from Eastern investors. Although conflicts between settlers and speculators remained extensive, the process by which these thousands of square miles of land were sold was widely perceived to be an equitable one and gave rise to the idiom "square deal" to represent the epitome of fair procedure.²⁰

In 1795 ratification of treaties with England and the Indian tribes resolved conflicting claims in the Northwest Territories.²¹ In response,

511 (1927). The "speculators," as the settlers called them, were merely investors seeking to put their capital into one of the few media for investment that was available at the time; there were no corporations, much less a stock market. PAUL W. GATES, *LANDLORDS & TENANTS ON THE PRAIRIE FRONTIER* 49 (1973).

18. B.A. HINSDALE, *THE OLD NORTHWEST* 255-79 (1888); ROHRBOUGH, *supra* note 13, at 10-33.

19. Peter Cathrope, *The Urban Context*, in *SUSTAINABLE COMMUNITIES* 1 (Sim van der Dyn & Peter Cathrope eds., 1986). For a general overview of the survey process, see HILDEGARD B. JOHNSON, *ORDER UPON THE LAND* (1976). To many people the grid system symbolized the equality of opportunity for land ownership. JOHN B. JACKSON, *AMERICAN SPACE* 25 (1972). To some, however, the grid seemed to be "an endless web that confuses and entraps the individual." CARL S. SMITH, *CHICAGO & THE AMERICAN LITERARY IMAGINATION* 180-81 (1984); *see also* KEVIN LYNCH, *A THEORY OF GOOD CITY FORM* 81-86 (1981); JOHN W. REPS, *THE MAKING OF URBAN AMERICA* 302 (1965).

20. STILGOE, *supra* note 14, at 106. Settlers who occupied land prior to the survey could claim a preemption right to a quarter section. WHITEHEAD, *supra* note 17, at 135-36 (1922); ROHRBOUGH, *supra* note 13, at 50; BENJAMIN H. HIBBARD, *A HISTORY OF THE PUBLIC LAND POLICIES* 152-54 (1965).

21. I OLIN D. MORRISON, *ILLINOIS "PRAIRIE STATE"* 18-19 (1960); *see also* I D.W. MEINIG, *THE SHAPING OF AMERICA* 409 (1986).

the postwar settlers quickly moved across the Ohio River into the rolling woodlands of what is now Ohio, Indiana and Southern Illinois. Here the terrain appeared quite similar to the coastal areas settled previously, and similar settlement patterns prevailed. Forests were cleared and the land converted to agricultural use.²²

To encourage settlement the government (and the creditors and speculators who backed it) needed to change the image of the small farmer. The traditional European vision of a small farmer was the "peasant," a person who engaged in demeaning agricultural labor thought by many in the slave states to be beneath the dignity of free people. The new model was to be the landowner, a heroic bastion of individualism and independence who mastered the wilderness.²³ Thomas Jefferson, in particular, fostered a vision of democracy based on a dominant class of small farmers who owned their own land.²⁴ Implementation of this new image required a dramatic change in the legal status of the small farmer.²⁵

The landowner obtained fee simple title, a concept that is now so familiar that it is difficult for us to imagine how exciting it must have been to settlers accustomed to European traditions. The European peasant was a tenant whose interests were subordinate to a landlord. Only in America were extensive opportunities to obtain fee simple title available. The craving for land ownership, and the independent status that went with it, brought a steady stream of settlers across the Appalachians from the east coast and Europe.²⁶ "A new order was created in America," wrote John Brinckerhoff Jackson. "Relationships, and especially the relationship to the environment, tended to assume a new, more impersonal, more abstract and legalistic form. Land was possessed and exploited not by merely physical means

22. ROHRBOUGH, *supra* note 13, at 103; SMITH, *supra* note 16, at 159.

23. SMITH, *supra* note 16, at 153; see JOHN M. FARAGHER, SUGAR CREEK: LIFE ON THE ILLINOIS PRAIRIE 49 (1986); I MEINIG, *supra* note 21, at 413.

24. It is too soon yet in our country to say that every man who cannot find employment, but who can find uncultivated land, shall be at liberty to cultivate it, paying a moderate rent. But it is not too soon to provide by every possible means that as few as possible shall be without a little portion of land. The small landholders are the most precious part of a state. Letter dated October 28, 1785, from Thomas Jefferson to James Madison, in THOMAS JEFFERSON, WRITINGS 840-42 (1984); see HINSDALE, *supra* note 18, at 300.

25. This change in legal status became "the formal expression of a community's relationship to nature" and thus provided the basic foundation of the relationship between the settlers and the midwestern environment. See William Cronon, *Kennecott Journey: The Paths Out of Town*, in UNDER AN OPEN SKY, *supra* note 10, at 43.

26. I MEINIG, *supra* note 21, at 410; Andrews, *supra* note 15, at 31; ROBERT C. BRAY, REDISCOVERIES 1-2 (1982).

but by contract." The new order "inspired a society based on the predictable and orderly movements of independent, equal individuals, each occupying a portion of the infinite, undifferentiated space made visible in the National Land Survey of 1785."²⁷

The desire of Midwesterners to own land was well matched by the desire of the federal government (and the eastern interests it represented) to sell it to them. These sales were a fiscal necessity for the new government and an opportunity for profit for individual eastern and European investors.²⁸ Moreover, the opportunity to funnel surplus population and new immigrants into the interior was seen as a "safety valve" that would avoid the buildup of congested, poverty stricken masses of the kind that had recently visited France with a bloody revolution, the repetition of which was dreaded by the leaders who governed the new union. As long as opportunities for land ownership in the interior were made available to the masses there would be no need for the ruthless repression and violent backlash from which France was still suffering.²⁹

The initial settlement of the midwest moved in a northwesterly direction across the Ohio River into what is now the state of Ohio, and then into what is now Indiana and southern Illinois. With the new settlers migrating along and across the Ohio River came the government land agents who administered the sales program.³⁰ Because capital was scarce the land agent served as a kind of banker, dealing in warrants and scrip in the course of concluding installment sales.³¹ Because land speculators were often the only source for loans, many hopeful landowners ended up as tenants when they were unable to repay the money they had borrowed to buy land, and antipathy between settlers and speculators was often intense.³² But in uneasy partnership they formed an alliance that created settlements in what is now Ohio, Indiana and southern Illinois as the War of 1812 ended.³³

B. THE PRAIRIE STATE

The terrain of southern Illinois is predominantly wooded hill country not unlike the eastern part of the Ohio River Valley.³⁴ But

27. John B. Jackson, *The Order of A Landscape, in THE INTERPRETATION OF ORDINARY LANDSCAPES* 153 (Olin D. Meinig ed., 1979); see Cronon, *Becoming West*, *supra* note 10, at 14-15.

28. See HINSDALE, *supra* note 18, at 301-03.

29. SMITH, *supra* note 16, at 293.

30. RICHARD C. WADE, *THE URBAN FRONTIER* 30-35 (1959).

31. GATES, *supra* note 17, at 53. The land agents were not trying to direct growth but merely sold land and recorded title. I MEINIG, *supra* note 21, at 411-12.

32. LEWIS MUMFORD, *STICKS & STONES* 36 (1924); GATES, *supra* note 17, at 63.

33. ROHRBOUGH, *supra* note 13, at 103; WADE, *supra* note 30, at 68-69.

34. See FREDERICK GERHARD, *ILLINOIS AS IT IS* 207, 275-76 (1857).

roughly between southern and central Illinois the terrain changes dramatically. The gently rolling forests in the south increasingly give way to open, flat prairie in the north. To the settlers it was known as the "Grand Prairie," and they doubted whether it would ever be occupied.³⁵ It was a world completely different from any they had ever known, stretching westward for what must have seemed an infinite distance. To some early visitors the prairie was reminiscent of the ocean.³⁶

The prairies were filled with wildlife. The settlers liked to say that the "prairie chickens" were so numerous that if one wanted omelets one need only lay a bonnet on the ground at night and find it full of eggs the next morning.³⁷ But to many settlers in the early 1800's, the prairie seemed "little more than a dreary uninhabited waste" in comparison to the forests of the east.³⁸ Because the settlers

35. ROBERT P. HOWARD, *ILLINOIS: A HISTORY OF THE PRAIRIE STATE* 106 (1972); John C. Hudson, *Settlement of the American Grassland, in THE MAKING OF THE AMERICAN LANDSCAPE* 170-72 (Michael P. Conzen ed., 1990); ROHRBOUGH, *supra* note 13, at 106; JOHNSON, *supra* note 19, at 16.

36. The resemblance to the sea which some of these prairies exhibited, was almost striking. . . . There is one spot in particular, near the middle of the Grand Prairie, if I recollect rightly, where the ground happened to be of the rolling character above alluded to, and where, excepting in the article of color, and that was not widely different from the tinge of some seas, the similarity was so striking, that I almost forgot where I was. The deception was heightened by a circumstance which I had often heard mentioned, but the force of which perhaps none but a seaman could fully estimate; I mean the appearance of the distant insulated trees as they gradually rose above the horizon, or receded from our view. They were so exactly like strange sails bearing in sight, that I am sure, if two or three sailors had been present, they would almost have agreed as to what canvass those magical vessels were carrying.

Capt. Basil Hall, *quoted in* GERHARD, *supra* note 34, at 272-73.

37. *Id.* at 273.

38. LEWIS C. BECK, *A GAZETTEER OF THE STATES OF ILLINOIS & MISSOURI* 44 (1823), *quoted in* HOWARD, *supra* note 35, at 106 n.9. In one of her earliest novels, Willa Cather eloquently described the fear that the prairie's magnificence often inspired:

The little town behind them had vanished as if it never had been, had fallen behind the swell of the prairie, and the stern frozen country received them into its bosom. The homesteads were few and far apart; here and there a windmill gaunt against the sky, a sod house crouching in a hollow. But the great fact was the land itself, which seemed to overwhelm the little beginnings of human society that struggled in its sombre wastes. It was from facing this vast hardness that the boy's mouth had become so bitter; because he felt that men were too weak to make any mark here, that the land wanted

had traditionally found arable land only where forests were growing, they originally assumed that if land failed to support trees it would also fail to support crops. The initial settlers advanced up to but not across the edge of the prairie, believing they had reached the limits of agricultural potential.³⁹

The discovery that the prairie was arable, that its grasses could be burned and its fertile soil used to grow crops, occurred about the end of the War of 1812.⁴⁰ It sparked a new rush of settlement into the land that in 1818 became "The Prairie State" — Illinois.⁴¹ To the cash-starved federal government the discovery that the prairie was arable was welcome and timely. New war-created debts intensified the need to make money from land sales. To a government for which empty land was the primary currency, the vision of maps of vast green prairie carved into salable sections must have created a sensation similar to that created by watching sheets of dollars flow off the presses of the Bureau of Engraving and Printing.⁴²

The early settlement of the Illinois prairie replicated the successes and conflicts that had recently taken place immediately to the east. Morris Birkbeck, an immigrant from England who settled in southern Illinois, left a valuable record of his experiences in a series of letters to other prospective English emigrants that was published in 1818 as

to be let alone, to preserve its own fierce strength, its peculiar, savage kind of beauty, its uninterrupted mournfulness.

WILLA CATHER, *O PIONEERS* 15 (1913).

39. JOHNSON, *supra* note 19, at 17-18; CLARENCE W. ALVORD, *THE ILLINOIS COUNTRY, 1673-1818*, at 415 (1922); Hudson, *supra* note 35, at 174; I J. SEYMOUR CURREY, *CHICAGO: ITS HISTORY & ITS BUILDERS* 158 (1912).

40. ALVORD, *supra* note 39, at 416; LOIS WILLE, *FOREVER OPEN, FREE & CLEAR* 12 (1972); see MORRIS BIRKBECK, *LETTERS FROM ILLINOIS* 38-39 (1818). Coincidentally, it was in this same year, 1815, that David Ricardo and other English writers were attributing the increase in English land rental rates to the need to cultivate increasingly marginal cropland. D.P. O'BRIEN, *THE CLASSICAL ECONOMISTS* 125-26 (1975).

41. HOWARD, *supra* note 35, at 97; I MORRISON, *supra* note 21, at 24-25.

Huge numbers of men, women and children began to move from the Old World into the new settlements on the edge of the wilderness or even directly into the wilderness itself. In sheer numbers, it was the greatest population movement in history to date, and it began to change the actual face of the planet with growing rapidity.

PAUL JOHNSON, *THE BIRTH OF THE MODERN* 202 (1991); see also FARAGHER, *supra* note 23, at 49.

42. The speculation in Illinois land was some of the most intense of anywhere during that period. A.M. SAKOLSKI, *THE GREAT AMERICAN LAND BUBBLE* 181-89 (1932); see BRAY, *supra* note 26, at 62-63; JOHN D. HAEGER, *THE INVESTMENT FRONTIER* 92-93 (1981).

Letters from Illinois.⁴³ Although he praised the fertility of the land and the ease with which the native vegetation gave way to European crops, Birkbeck lamented the prevalence of "land jobbers" who travelled the country like a "persistent blight."⁴⁴ Wherever they see promise of a new settlement, he said, they "purchase large tracts of the best land, and lock it up in real *mortmain*, for it is death to all improvement." These non-resident investors "speculate on [the settlers'] prosperity, whilst they are doing all they can to impede it."⁴⁵ Birkbeck also decried the failure of the settlers and local merchants to invest their capital in more intensive farming practices because they were lured by the promise of greater returns from investment in idle, vacant land:

Merchants rarely recycle their wealth into farming but into land speculation, holding back from cultivating millions of

43. BIRKBECK, *supra* note 40. Another English traveller, Henry Fearon, was somewhat skeptical of Birkbeck's enthusiastic praise of Illinois, but he too said that for the "small farmer who has a family . . . America decidedly offers inducements very superior to those afforded by this country." HENRY B. FEARON, *SKETCHES OF AMERICA* 439 (1818). Fearon said that the Europeans living in Illinois consisted of some prosperous old French settlers and "a medley of land-jobbers, lawyers, doctors, and farmers, who traverse this vast continent, founding settlements, and engaging in all kinds of speculation. *Id.* at 261.

44. FEARON, *supra* note 43, at 54. Of course the environmental impact of such "species-shifting" was immense. Cronon, *Becoming West*, *supra* note 10, at 11-12.

In autumn and spring millions of migratory pigeons (*Ectopistes migratoria*, And.), arrive; immediately everybody hurries into the field to exact a tribute from the passing flights so that all day long nothing but continuous discharges are heard.

GERHARD, *supra* note 34, at 253.

As Professor Joseph Sax has put it,

A fundamental purpose of the traditional system of property law has been to destroy the functioning of natural resource systems Under our legal system we cut up land into arbitrary pieces (such as square, 160-acre tracts) and then endow the owner with the right, indeed with every encouragement, to enclose the land and make it exclusive. Why have we done this? Because our dominant purpose was to transform the American landscape from what it was — in effect a wilderness and a wildlife economy — into an agricultural (and later industrial) economy.

Joseph L. Sax, *Ecosystems & Property Rights in Greater Yellowstone*, in *THE GREATER YELLOWSTONE ECOSYSTEM* 77 (Robert B. Keiter & Mark S. Boyce eds., 1991). See generally Donald Worster, *Transformations of the Earth: Toward an Agroecological Perspective in History*, 76 J. AMER. HIST. 1087 (1990).

45. BIRKBECK, *supra* note 40, at 54. The location of Birkbeck's settlement was near the Wabash river, about forty miles north of its confluence with the Ohio. See DAVID BUISSET, *HISTORIC ILLINOIS FROM THE AIR* 52-53 (1990).

acres and scattering the population, thus increasing the difficulties of settlers manifold.⁴⁶

Before long, however, the fever of land speculation was broken by the first of a series of boom and bust cycles that Illinois real estate witnessed throughout the nineteenth century.⁴⁷ Typically, promoters would buy land, record paper plats of lots and blocks for a new city, and use them as the basis for sales of lots to buyers on the East coast and in Europe who had never seen the prairies and relied solely on the representations of the developers that a future metropolis was being born.⁴⁸ The nineteenth century humorist David Locke captured the prototype of these land sales schemes in this popular novel *A Paper City*:⁴⁹ promoters build up landowners' dreams with empty promises of future development. The landowners bid up land values on paper with highly leveraged transactions among themselves at increasingly inflated prices. Just before the fraud becomes apparent the promoter steals away in the dead of night with a satchel of cash and the townspeople lose everything.⁵⁰

Illinois was a particularly fertile area for land speculation because its land seemed so undifferentiated: an almost continuous expanse of prairie, each section and township of which appeared to the casual observer almost indistinguishable from every other section and township.⁵¹ The purchase of unseen land in Ohio was compared to a vast

46. BUISSET, *supra* note 45, at 84-85. "Like men who had been starved too long for food," wrote Lewis Mumford, "a horde of hungry people" arrived for whom "the land existed to be . . . gutted out, to serve for a hasty turnover of profit." LEWIS MUMFORD, *THE BROWN DECADES* 28-32 (1931).

47. HOWARD, *supra* note 35, at 205-06; CHARLES G. SELLERS, *THE MARKET REVOLUTION* 54 (1991). The overextension of credit for western land speculation was one of the primary causes of the "Panic of 1837." SAMUEL E. MORRISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 455 (1965). See HIBBARD, *supra* note 20, at 215.

48. BRAY, *supra* note 26, at 1; SAMUEL P. HAYS, *CONSERVATION & THE GOSPEL OF EFFICIENCY* 360 (1969); STANLEY K. SCHULTZ, *CONSTRUCTING URBAN CULTURE* 12 (1989).

49. DAVID R. LOCKE, *A PAPER CITY* (1878).

50. *Id.* at 258-63, 377-86. Despite the occasional fraud, there has probably been no period in recorded history when good agricultural land in a secure location was available to the average person for so small a price as during the first few decades of the nineteenth century. See JOHNSON, *supra* note 41, at 209. By providing an active market for land, the speculators probably made it easier for most families to obtain the type and size of tract that best suited them. *Id.* at 214-15.

51. See JACKSON, *supra* note 27, at 153, 160. The territorial legislature of Illinois petitioned Congress in 1812 to pass a law giving actual settlers a preference in buying

lottery because the land's value could vary so greatly depending on the local geography,⁵² but on the Illinois prairie the land's resource value varied so little from one section to another that land in agricultural areas traded more like a pure commodity than like eastern real estate.⁵³ Indeed, in the early years of the state, land served not only as one commodity but as the effective *currency* of the state: the commodity that investors preferred and the basis on which the state's economy functioned.⁵⁴

Although the use of land as a form of currency was not confined to Illinois, its importance as currency in Illinois probably exceeded that in any other territory in the first half of the century. Of the areas then settled, only Illinois was a mass of undifferentiated prairie overlain by the uniform grid of the Northwest Ordinance.⁵⁵ The fertility of the soil and the absence of other obvious natural resources made land the most reliable currency, and created a demand for legal devices that would promote and stabilize land values, a demand that would recur in the thinking of the judges and legislators who developed the Illinois law relating to land throughout the nineteenth and early twentieth centuries.⁵⁶

C. PROSPERITY BLOSSOMS

Jefferson had foretold a society of small landowners living a prosperous agrarian lifestyle who would participate in democratic policy-making in its ideal, classic form, free from the impurities that he saw in the coastal cities.⁵⁷ Illinois farmers did prosper; so much so that the agrarian ideal proved to be self-defeating. The soil was so fertile, the crops so abundant, that the farmers soon began to be concerned with markets and transportation, and out of these concerns the growth of cities was inevitable.⁵⁸

the land on which they lived, and Congress passed such a law for the Illinois Territory in 1813. HENRY TATTER, *THE PREFERENTIAL TREATMENT OF THE ACTUAL SETTLER IN THE PRIMARY DISPOSITION OF THE VACANT LANDS IN THE UNITED STATES TO 1841*, at 127 (1979).

52. I MEINIG, *supra* note 21, at 47.

53. Andrews, *supra* note 15, at 35.

54. GATES, *supra* note 17, at 53-57; see DON H. DOYLE, *THE SOCIAL ORDER OF A FRONTIER COMMUNITY* 103-08 (1983); Jackson, *supra* note 27, at 153; HOMER HOYT, *ONE HUNDRED YEARS OF LAND VALUES IN ILLINOIS* 59 (1933); THEODORE C. PEASE, *THE STORY OF ILLINOIS* 125-27 (1965). Debts incurred from speculative land deals of early Illinois legislatures were not finally paid off until 1880. HOWARD, *supra* note 35, at 228.

55. COLLUM DAVIS, *ILLINOIS: CROSSROADS & CROSS SECTION* 131-32 (1990).

56. See *infra* note 162.

57. See *supra* note 23. SMITH, *supra* note 16, at 154-62.

58. SMITH, *supra* note 16, at 178-79. Illinois prairie soils are still among the best in America. Hudson, *supra* note 35, at 176.

To settlers in southern Illinois, the Ohio and Mississippi Rivers appeared to be the logical way for their crops to reach the busy port of New Orleans, recently acquired as part of the Louisiana purchase.⁵⁹ Waterways were the dominant mode of travel in the early nineteenth century; eastward transport by water was blocked by the mountains, but the steamboats that arrived on the Ohio and Mississippi after 1816 brought increasingly rapid transportation to New Orleans.⁶⁰ Cairo, Illinois, situated at the confluence of the Ohio and Mississippi Rivers, aspired to serve as a major transfer point, but its aspirations eventually served merely as the celebrated object of Charles Dickens' ridicule on his American journey.⁶¹

St. Louis, Missouri, near the confluence of the Missouri and Mississippi Rivers, soon overtook other cities in the area as a trade center and consolidation point for further westward expansion.⁶² Although St. Louis retained important economic influence in southern Illinois, the construction of the Erie Canal made it appear that the Great Lakes would provide a shorter and more significant accessway to the major east coast and European markets than the Ohio and Mississippi rivers.⁶³ As that awareness grew the attention of Illinois increasingly focused on the small sector of the state that adjoined the Great Lakes.

III. THE CITY BY THE LAKE

A. THE WINDY CITY

In the 1820's, Chicago was a pioneer settlement of a dozen or so structures clustered around Ft. Dearborn at the point where the Chicago River entered Lake Michigan.⁶⁴ The land speculators and

59. Abraham Lincoln, while representing Illinois in Congress, argued against the South's secession from the union because it would cut off access for Illinois farm products to New Orleans. SMITH, *supra* note 16, at 188. Lincoln was one of the major promoters of the Illinois legislature's 1836 plan for major north-south river and railway corridors; the quickly-aborted attempt to implement this plan bankrupted the state government in 1841. I J. SEYMOUR CURREY, CHICAGO: ITS HISTORY & ITS BUILDERS 254-59 (1912); GERHARD, *supra* note 34, at 81-89; HAEGER, *supra* note 42, at 205-09; PEASE, *supra* note 54, at 125-27.

60. HOWARD, *supra* note 35, at 105; JOHNSON, *supra* note 41, at 194-97; WADE, *supra* note 30, at 70-71.

61. DAVIS, *supra* note 55, at 127; JOSEPH KIRKLAND, THE STORY OF CHICAGO 227 (1892); HAYS, *supra* note 48, at 360. For a current view of Cairo, see RON POWERS, FAR FROM HOME (1991).

62. WADE, *supra* note 30, at 190.

63. CRONON, *supra* note 9, at 60-61.

64. I A.T. ANDREAS, HISTORY OF CHICAGO FROM THE EARLIEST PERIOD TO THE PRESENT TIME 111 (1884).

promoters may have gulled unsophisticated investors into disastrous ventures in paper cities downstate, but those who foresaw in the 1830's that Chicago would become one of the world's great cities had no reason to regret their investment — at least if they survived the exaggerated boom and bust cycles that the city experienced throughout the nineteenth Century.⁶⁵

That many people foresaw Chicago's future growth was soon apparent.⁶⁶ The nickname "Windy City" was applied to Chicago, not because of any climatological anomaly, but because its boosters bragged so long and loud about its future.⁶⁷ The initial cause for optimism about the future of Chicago was its location at the intersection of the country's two major internal routes for water-borne transportation: the Great Lakes and the Mississippi River system. Navigable tributaries of the Mississippi reached to within a few miles of the Chicago River, which drained into Lake Michigan. Indian traders could cross the intervening marsh by canoe at times of high water. Chicago foresaw itself the capital of an inland empire that was potentially one of the richest the world had ever seen.⁶⁸

The success of the Erie Canal in promoting trade through the Great Lakes inspired hopes that the construction of a canal connecting Lake Michigan with the Mississippi River system would be equally fruitful.⁶⁹ This prospect began to attract settlers to Chicago in large numbers in the 1830's.⁷⁰ The initial subdivision of land in Chicago was platted in 1830.⁷¹ A grid encompassing the north half of what is now known as the loop, it followed the basic pattern of section lines established by the national survey. Blocks were roughly square and streets were oriented to the points of the compass.⁷²

The site of the city was essentially a "tabula rasa," as Daniel Bluestone calls it in his recent book *Constructing Chicago*.⁷³ For as

65. HOYT, *supra* note 54, at 402; REPS, *supra* note 19, at 300; ANSELM L. STRAUSS, *IMAGES OF THE AMERICAN CITY* 154 (1961).

66. JACKSON, *supra* note 19, at 72; STRAUSS, *supra* note 65, at 35-37.

67. EMMETT DEDMON, *FABULOUS CHICAGO* 221 (2d ed. 1981). For examples of hyperbolic self-praise by Chicagoans see KIRKLAND, *supra* note 61; ROBERT SHACKLETON, *THE BOOK OF CHICAGO* (1920).

68. DANIEL BLUESTONE, *CONSTRUCTING CHICAGO* 197 (1991); IRVING CUTLER, *CHICAGO: METROPOLIS OF THE MID-CONTINENT* 10 (2d ed. 1976); STRAUSS, *supra* note 65, at 34-38, 159; SAM B. WARNER, JR., *THE URBAN WILDERNESS* 100-01 (1972).

69. HOMER HOYT, *THE STRUCTURE & GROWTH OF RESIDENTIAL NEIGHBORHOODS IN AMERICAN CITIES* 10-11 (1939).

70. I ANDREAS, *supra* note 64, at 142-43.

71. REPS, *supra* note 19, at 300.

72. CUTLER, *supra* note 68, at 22.

73. BLUESTONE, *supra* note 68, at 205.

far as one could travel in a day's time in any direction but east, the prairie extended into the distance with only the minor undulations of former dune lines interrupting the flat landscape.⁷⁴ The initial subdivision was quickly followed by many others, each continuing the basic gridiron pattern that gave the midwest its most distinctive trait.⁷⁵ To Chicagoans of the time there seemed to be no limits to the potential expansion of this network.⁷⁶

B. THE CITY IN THE GARDEN

The official motto of the City of Chicago is *Urbs in horto* — the city in the garden.⁷⁷ This motto reflects the attitude of its early settlers to their recent discovery that the prairie soil was fertile and could be used to grow crops without the time-consuming chore of clearing the forest. To pioneers who had worked hard just to feed themselves, the prairie was indeed a beautiful garden, capable of providing not only the family's necessities but bountiful crops of grain to be sent to market. Throughout Illinois and neighboring states the capacity for growing agricultural produce increased rapidly after the initial wave of settlement.⁷⁸

Although the prairie may have seemed unaesthetic to strangers, to those who appreciated its productive capacity it truly was a garden. "Agrophilia," as J.B. Jackson has called the love of horizontal spaces,⁷⁹ created a new prairie aesthetic: "Nowhere does nature sit

74. I CURREY, *supra* note 59, at 158-59; HOYT, *supra* note 69, at 300.

75. JACKSON, *supra* note 19, at 61-62; REPS, *supra* note 19, at 300-02.

It has often been said that the main characteristic of the American urban grid is its neutrality. It knows no hierarchy, it favours no special places, it disregards the topography of the site, and it allows no exceptions to the rule In the United States land existed to be sold, and the grid was a device for cutting it into handy portions, available to anyone who could meet the price. In the most generous interpretation the grid system has been described as America's democratic answer to the autocratic axiality of the European systems.

THOMAS A.P. VAN LEEUWEN, *THE SKYWARD TREND OF THOUGHT* 79 (1988). *But see* SPIRO KOSTOF, *THE CITY SHAPED* 100 (1991) ("What matters in the long run is not the mystique of grid geometry, but the luck of first ownership.").

76. CARL W. CONDIT, *CHICAGO, 1910-29*, at 18-19 (1973); KOSTOF, *supra* note 75, at 82.

77. KOSTOF, *supra* note 75, at 19.

78. HUDSON, *supra* note 35, at 176-78; SMITH, *supra* note 16, at 182-83.

79. JOHN B. JACKSON, *DISCOVERING THE VERNACULAR LANDSCAPE* 65 (1984); *see* I CURREY, *supra* note 59, at 160. For an interesting theory that some people have more interest in "places" than others *see* FRITZ STEELE, *THE SENSE OF PLACE* 43-47 (1991).

more majestically enthroned," wrote an early prairie lover, "over-awing man by the terrible grandeur of her phenomena, than on these immense prairies. What can be more beautiful and charming than a summer's day — what more sublime and terrific than thunder-storm, on these plains?"⁸⁰ Frank Lloyd Wright would eventually capture eloquently the common attitude of Midwesterners when he said "I loved the prairie by instinct as, itself, a great simplicity; the trees, flowers and sky were thrilling by contrast."⁸¹ He saw that the plains had their own natural beauty that could be reflected in a unique architecture.⁸²

Long before Wright's time, however, Chicagoans had good reason to view the surrounding prairie as a thing of beauty. Chicagoans viewed these agricultural lands as their own empire — potentially one of the richest and most populous that the world had ever seen.⁸³ As the crops thrived the need for transport and marketing services grew. Chicagoans viewed their garden not as an avocation but as one of the primary bases of the economy. Storing, shipping and trading the produce of the land became the preoccupation of Midwesterners in the mid-nineteenth century.⁸⁴

As Professor Cronon puts it, "Chicago was just the site of a country fair, albeit the grandest, most spectacular country fair the world had ever seen." Chicago's growth "was in no small measure the creation of people in its hinterland, who in sending the fruits of their labor to its markets brought great change to city and country alike."⁸⁵ Although the native Americans had always grown small plots of corn, the new settlers "grew so much greater quantities on much larger plots of land" that "they did things no Indians had ever done with it: turned it into whiskey or fed it to hogs or other livestock" so that it could more easily be shipped to markets. "They also began to raise crops that had never before been part of the regional landscape: old-world grains, especially wheat, as well as a wealth of fruit and vegetable species."⁸⁶

C. THE CITY THAT WORKS

Chicago's initial settlers recognized that the city's economic growth depended on the development of trade routes that would converge on

80. GERHARD, *supra* note 34, at 279.

81. FRANK L. WRIGHT, *AN AMERICAN ARCHITECTURE* 193 (1955).

82. *Id.*

83. JACKSON, *supra* note 19, at 72; *see* HOYT, *supra* note 69, at 197.

84. CRONON, *supra* note 9, at 97-147; HOYT, *supra* note 69, at 47; III BESSIE L. PIERCE, *A HISTORY OF CHICAGO* 65-92 (1957).

85. CRONON, *supra* note 9, at 97.

86. *Id.* at 98.

the city. Initially they focused on the construction of a canal connecting Lake Michigan with the Mississippi River system.⁸⁷ Financing such an undertaking was no easy task for sparsely settled Illinois. The state used its only valuable commodity, land, as security to obtain the capital necessary to build the canal.⁸⁸ By selling investors large tracts of land along the canal route, the state finally succeeded in completing the Illinois and Michigan Canal in 1848.⁸⁹

The canal had barely been opened when it began to be apparent that the railroad would become a more efficient way of transporting most goods than water transport.⁹⁰ Since the completion of the canal had made Chicago the center of trade and population for the Midwest, it was natural that many railroad companies would choose it as a terminus.⁹¹ The construction between 1848 and 1857 of over 4000 miles of railroad track leading into Chicago gave it the status of railroad capital of the nation and "sustained her citizens in their unbounded confidence, and in what had sometimes seemed the wildest visions of a glorious future."⁹² Like many other railroad companies, the Illinois Central Railroad and many other railroad companies obtained financing through the same type of land grant that was used for the I. & M. Canal.⁹³

The growth of population attracted by this increase in trade began to make it increasingly apparent that Chicago's "perfect site" for expansion contained a number of major flaws. In the first place, much of the land on which Chicago was built was what today would be called wetlands.⁹⁴ Stories were told about horses and wagons disappearing into the mud of the city's streets.⁹⁵ Any substantial rain

87. President Madison talked about the possibility of such a canal as early as 1814. LOUIS P. CAIN, *SANITATION STRATEGY FOR A LAKEFRONT METROPOLIS* 9 (1978).

88. HOWARD, *supra* note 35, at 228. Alternative sections of land along the proposed route of the canal were granted to the state in 1827 by the federal government. One of those sections was subdivided and auctioned off in 1830 and now is the site of downtown Chicago. HENRY R. HAMILTON, *THE EPIC OF CHICAGO* 170-71 (1932).

89. HOYT, *supra* note 54, at 12; Completion of the canal was stalled for many years by the financial panic of 1837. *See supra* note 54.

90. II CURREY, *supra* note 59, at 170; HAROLD M. MAYER & RICHARD C. WADE, *CHICAGO: GROWTH OF A METROPOLIS* 28 (1969); SMITH, *supra* note 19, at 32.

91. HOYT, *supra* note 54, at 54.

92. I ANDREAS, *supra* note 64, at 262; *see also* HOYT, *supra* note 54, at 58; MAYER & WADE, *supra* note 90, at 35-42; WARNER, *supra* note 68, at 104.

93. I CURREY, *supra* note 59, at 262-75; GATES, *supra* note 17, at 65; GERHARD, *supra* note 34, at 133-34; HOWARD, *supra* note 35, at 244.

94. CUTLER, *supra* note 68, at 23.

95. HAMILTON, *supra* note 88, at 266; KIRKLAND, *supra* note 61, at 140; MAYER & WADE, *supra* note 90, at 24; WILLE, *supra* note 40, at 24.

made movement around the city difficult and severely hampered the ability of surrounding farmers to bring their goods to market.⁹⁶

To deal with this problem, the city undertook a bold program to elevate the city's streets. The relative abundance of lumber, which was arriving in large quantities from Michigan and Wisconsin, made it feasible to build elevated plank roads and walkways along major thoroughfares.⁹⁷ The invention of a process to jack up existing buildings made it practical to elevate major portions of the city to meet the new standard grade.⁹⁸

The flat, low-lying land on which Chicago was situated also created another problem. The Chicago River, which provided the city's natural drainage, moved sluggishly across the flat prairie.⁹⁹ As more and more wastes were poured into the river, the river's ability to remove them was tested.¹⁰⁰ And with the construction of major stockyards to handle a growing trade in cattle and hogs, the river proved to be totally inadequate to remove the slaughtering wastes.¹⁰¹

The idea of reversing the flow of the river to send the wastes toward the Mississippi was discussed early in the city's history.¹⁰² It was hoped that the construction of the Illinois and Michigan Canal in 1848 would cause the river's flow to reverse but the canal was too small for that purpose.¹⁰³ When cholera epidemics struck the city it was finally recognized that a solution must be found.¹⁰⁴ The legislature created a sanitary district and authorized the creation of a much larger canal connecting the Chicago River with the Mississippi system.¹⁰⁵ Construction of this canal, which effectively reversed the flow of the river, was completed in 1899.¹⁰⁶

96. HOYT, *supra* note 54, at 22.

97. CUTLER, *supra* note 68, at 23; III PIERCE, *supra* note 84, at 92-107; SCHULTZ, *supra* note 48, at 171-72. For a description of the lumber trade in Chicago during this period, see CRONON, *supra* note 9, at 159-83.

98. KIRKLAND, *supra* note 61, at 232-33; MAYER & WADE, *supra* note 90, 97-98; SMITH, *supra* note 19, at 239. The raising of most of the streets was completed in a two year period from 1856 to 1858. HAMILTON, *supra* note 88, at 283.

99. CUTLER, *supra* note 68, at 23.

100. II CURREY, *supra* note 59, at 190-96; SCHULTZ, *supra* note 48, at 170.

101. Jon A. Peterson, *The Impact of Sanitary Reform Upon American Urban Planning, 1840-90*, J. Soc. HIST. 83, 90 (1979).

102. CAIN, *supra* note 87, at 12.

103. Not until the canal was deepened in 1871 was the flow of the river actually reversed on a normal basis. *Id.* at 61.

104. PETERSON, *supra* note 101, at 90; PIERCE, *supra* note 84, at 310-11. The city originally sought to assess the cost of deepening the canal on the packing industry but eventually backed down. ROBIN L. EINHORN, PROPERTY RULES 204-11 (1991).

105. CAIN, *supra* note 87, at 31.

106. *Id.* at 71-76; Peterson, *supra* note 101, at 96; see BUISSET, *supra* note 45,

A third problem with Chicago's site was its supply of potable water. From the beginning the city drew its water from intakes along the shore of Lake Michigan.¹⁰⁷ But by dumping its wastes into the river that emptied into the lake the city was endangering its own water supply, and recurring cholera epidemics made it apparent that a new source of clean water was needed.¹⁰⁸ The solution was the construction of underground tunnels under the bed of the lake that connected intake "cribs" miles from shore with the onshore water works. Construction of this water supply system was a major engineering feat. The first tunnel was completed in the 1860s, and the system remains the source of water for Chicago and many of its suburbs today.¹⁰⁹ Chicagoans like to call their city the "city that works." To the sanitary engineers of the day such a model was almost more than a metaphor. They saw the city as the equivalent of a human body and their watermains and sewer pipes as the blood vessels that kept the city alive.¹¹⁰ This image of the city as a living organism became a theme that would recur early in the next century.¹¹¹

The success of engineering remedies for the natural inadequacies of land for development encouraged Chicagoans to ignore the natural features that distinguished one site from another. The land all looked alike, and engineering could solve any problems that arose, so there was little need for legal rules to differentiate one tract from another. In the years following the civil war, subdivisions multiplied at an unprecedented scale, pushing the limits of subdivided land to and beyond the boundaries of today's Chicago. The infinite replicability of the grid plan on the prairie led Chicagoans to believe that the city and its suburbs could expand indefinitely with confidence that engineering would cure any defects that might be found.¹¹²

106. *Id.* at 71-76; Peterson, *supra* note 101, at 96; see BUISSET, *supra* note 45, at 172.

107. III CURREY, *supra* note 59, at 142-51.

108. PIERCE, *supra* note 84, at 311. In the rainy summer of 1879 the river discharged into the lake for 30 straight days. CAIN, *supra* note 87, at 63.

109. JOHN C. TEAFORD, *THE UNHERALDED TRIUMPH* 217-25 (1984); SCHULTZ, *supra* note 48, at 164.

110. SCHULTZ, *supra* note 48, at 191; see also ADNA F. WEBER, *THE GROWTH OF CITIES IN THE NINETEENTH CENTURY* 183 (1899).

111. See *infra* text accompanying notes 190-202.

112. Jerome D. Fellman, *Pre-building Growth Patterns of Chicago*, 47 *ANNALS OF THE ASS'N OF AMER. GEOGRAPHERS* 59, 74 (1957); II ANDREAS, *supra* note 64, at 571-73. "No wonder that when the Chicago writer Frank L. Baum drew his fanciful fairy story of the magical land of Oz, he personified the directions themselves."

Chicago pioneered not only in civil engineering but in building construction. The "balloon frame" method of building small structures, a method that still dominates homebuilding today, was invented in Chicago in the 1830's.¹¹³ Instead of using logs or other heavy material as building blocks, as in the traditional log cabin, Chicagoans began to build a framework of light wooden studs and joists on which siding was fastened.¹¹⁴ This dramatic innovation in construction technology soon became popular everywhere. In Chicago it made possible the rapid construction of wooden structures necessary to accommodate the thousands of newcomers who arrived in the city from the east coast and Europe.¹¹⁵

During the 1850's and 1860's the city's economic base grew rapidly and became highly diversified. Railroads, grain, lumber, cattle and hogs all provided jobs for a growing number of people at all levels of society.¹¹⁶ The city grew rapidly to the north, west and south.¹¹⁷ The great fire of 1871 brought a sudden hiatus to Chicago's

JAMES B. GILBERT, *PERFECT CITIES* 23 (1991).

Rising from the plain, the Emerald City can also be seen as Chicago, the great white city which subsumed into itself and transformed so much creative Midwestern aspiration, Baum's included, in the 1890s; but by the 1910s much of Chicago was relocating to Los Angeles, another city rising in the plain. Oz might have begun as Chicago, but when Chicago in turn envisioned its own Oz it was the City of Angels.

And real estate developers "were the wizards of Oz, the middlemen of symbols and dreams." KEVIN STARR, *MATERIAL DREAMS* 67, 391 (1990).

Frank Baum and Louis Sullivan were both born in Chicago in the same year, and both flourished "in the same burst of creative energy that distinguished Chicago around the turn of the century," but in later years Baum retired to "Ozcot," a home he built for himself in Hollywood. FRANK J. BAUM & RUSSELL P. MACFALL, *TO PLEASE A CHILD* 209, 264 (1961). For a modern view of the myth of Oz as a paradigm for human transformation, see MADONNA KOLBENSCHLAG, *LOST IN THE LAND OF OZ* 18-21 (1988).

113. "Unlike earlier framing methods," the balloon frame "used light dimension lumber nailed together, as against the mortise-and-tenon and pegged connections of earlier work Dimensioned lumber and cheap nails made possible a whole new order of speed and economy in wood framing." I JAMES M. FITCH, *AMERICAN BUILDING* 121 (2d ed. 1966); see also JOHN BURCHARD & ALBERT BUSH-BROWN, *THE ARCHITECTURE OF AMERICA* 70 (1961).

114. *Id.*

115. III PIERCE, *supra* note 84, at 20-50.

116. II ANDREAS, *supra* note 64, at 571-73;

SMITH, *supra* note 16, at 63-67.

117. MAYER & WADE, *supra* note 90, at 66-70. The proliferation of wooden balloon frame buildings presented a serious fire hazard. Early builders fastened siding on both sides of a balloon frame wall leaving the interior hollow, thus creating a

rapid growth, but the fire didn't destroy the economic base of the city. The stockyards and many of the lumberyards were untouched,¹¹⁸ and Chicago retained its location as the hub of American railroads and the primary transfer point for Great Lakes shipping.¹¹⁹ The rebuilding of Chicago began almost immediately after the fire and quickly brought the city back to life.¹²⁰ Grudgingly, at the insistence of eastern insurance companies, the city even adopted fire codes that mandated fire stops within balloon frame walls and established fire limits within which wood construction was prohibited.¹²¹

The city that was rebuilt after the fire followed the same street and lot lines as its predecessor, spreading ever more widely across the prairie.¹²² But new construction technology enabled builders to erect much larger structures than in the pre-fire city.¹²³ The use of steel framing to erect tall buildings was introduced by a Chicago engineer, William LeBaron Jenney, in the 1880's.¹²⁴ Earlier tall office buildings,

chimney effect that would accelerate any fire's upward spread. The rapid rate of immigration and the absence of building or fire codes induced landowners to cover virtually all of their lots with wooden, balloon frame structures. Block after block of these buildings spread outward from downtown Chicago in three directions. See *id.* at 103-06; CRONON, *supra* note 9, at 179.

118. While the city's physical plant was severely affected, its importance as a commercial and industrial hub remained essentially undisturbed. Chicago maintained its unrivaled geographic superiority for railroad, canal, river and lake traffic. The city's grain, lumber, and stock, according to the Chicago Board of Trade, were left seventy-five to eighty percent intact, as was almost ninety percent of its manufacturing, machinery, and products.

Ross Miller, *Chicago's Secular Apocalypse*, in CHICAGO ARCHITECTURE, 1872-1922, at 27, 32-33 (John Zukowsky ed., 1987).

119. MAYER & WADE, *supra* note 90, at 112.

120. See generally ROSS MILLER, AMERICAN APOCALYPSE (1990).

121. KIRKLAND, *supra* note 61, at 325-36; III PIERCE, *supra* note 84, at 308-09.

122. MILLER, *supra* note 120, at 27-28; III PIERCE, *supra* note 84, at 50-51.

123. KIRKLAND, *supra* note 61, at 322-24; see JACKSON, *supra* note 19, at 81. The leaders of the business sector in Chicago had been successful real estate speculators and many of them saw the fire as an opportunity. See EINHORN, *supra* note 104, at 226-27.

124. A finished building of skeletal construction can be reduced to nothing more than a framework covered by glass. Actually a structure like Jenney's skyscraper has no wall in the usual sense of the word but only a succession of vertical and horizontal bands of masonry or weatherproof metal covering the outermost columns and beams.

CARL W. CONDIT, THE RISE OF THE SKYSCRAPER 114 (1952); see also BURCHARD & BUSH-BROWN, *supra* note 113, at 153-54; PAUL GOLDBERGER, THE SKYSCRAPER 23 (1986); MAYER & WADE, *supra* note 90, at 130-31; VAN LEEUWEN, *supra* note 75, at 52.

of which the Monadnock building is one of the few remaining in the city, were constructed in building block fashion, which required extremely thick walls at the base in order to support walls of substantial height.¹²⁵ Iron had earlier been used in the construction of balloon frame buildings but its tendency to melt in the heat of a fire made its use impractical where substantial height was desired.¹²⁶ Steel, however, would withstand high temperatures. Soon steel frame construction became the norm for the construction of tall buildings (which it remains today) and Chicago's downtown took a quantum leap upward in height. "Chicago's primacy as the city of skyscrapers in the two closing decades of the century cannot be denied," wrote New York architecture columnist Paul Goldberger.¹²⁷

D. PLASTIC CHICAGO

To most Americans, the new skyscrapers were an awe-inspiring symbol of industrial progress. "Extending toward the sun, elevating tenants above earthly miasmas, making abundant provision for natural light and mechanical ventilation, skyscrapers appeared to many nineteenth-century Chicagoans to be allied with more natural landscapes such as those in parks and suburbs."¹²⁸ The skyscraper was a

125. BURCHARD & BUSH-BROWN, *supra* note 113, at 154; GOLDBERGER, *supra* note 124, at 25; NIKOLAUS PEVSNER, A HISTORY OF BUILDING TYPES 220-21 (1976).

126. BURCHARD & BUSH-BROWN, *supra* note 113, at 135-36; GOLDBERGER, *supra* note 124, at 23.

127. GOLDBERGER, *supra* note 124, at 24. Goldberger credits it to Chicago's "extraordinary blend of energy and confidence, of intelligence and freshness of outlook . . ." *Id.* For other speculation on why Chicago was the birthplace of the skyscraper, see EDWARD RELPH, THE MODERN URBAN LANDSCAPE 36 (1987).

128. BLUESTONE, *supra* note 68, at 141. "In Chicago, moreover, the more ordered layout of streets led to a more ordered city." GOLDBERGER, *supra* note 124, at 26.

The skyline described a premeditated human order, one indebted solely to technology and the profit-seeking designs of man. It was a great shift from the traditional view of the city, enveloped by sky and earth, at once nurtured and held in check by this primordial frame.

KOSTOF, *supra* note 75, at 324.

The aesthetic beauty of the repeated patterns of vertical and horizontal patters that form the structure of the skyscraper was captured by Chicago architect Louis Sullivan, whose motto "form follows function" served as a motto for what would become the "Chicago School" of architecture.

Sullivan . . . hardly thought of technology at all, but of the building as a functioning human institution with certain logical formal possibilities: a geometric cube containing an entrance door as a base, a honeycomb of identical office floors stressing the vertical dimension but repeating the scale

three-dimensional extension of Chicago's familiar grid pattern that inspired confidence in the continuing ability of technology to surmount nature's historic limitations.

Proud of their progress, Chicagoans decided to throw a party and invite the world to see the rebuilt city. In 1892, the appropriate occasion was the 400th anniversary of Columbus' first western hemisphere landing. Chicago sought and received international sanction for a worlds' fair to mark the occasion.¹²⁹ Extending south of downtown for dozens of blocks, the lakefront parks and adjacent area were temporarily transformed into a site for dozens of sparkling white marble buildings bordered by lakes and gardens.¹³⁰

Visitors from all over the country came to marvel at the "White City." Henry Adams, for example, "set off to Chicago to study the Exposition again, and stayed there a fortnight absorbed in it." Americans were proud of it, he said, because they had "leaped directly from Corinth and Syracuse and Venice, over the heads of London and New York, to impose classical standards on plastic Chicago."¹³¹ Although the White City called attention to the grime, pollution and crowded conditions of the real city, the worlds' fair was deemed a success by Chicagoans. They had demonstrated their capability for overcoming adversity and combining skillful engineering with an aesthetic that had great popular appeal.¹³²

The White City was not only a masterpiece of public relations, it also stimulated, or at least witnessed, new ideas about the future

of the individual window

VINCENT SCULLY, *AMERICAN ARCHITECTURE & URBANISM* 108 (1969); see I FITCH, *supra* note 113, at 201; LYNCH, *supra* note 19, at 83-88.

The contractor who built what was seen as the ultimate skyscraper of its day, the Empire State Building in New York City, wrote:

The fundamental fact of the design was its simplicity — a straight shaft rising, with a few setbacks, from the sixth the eighty-fifth floor Given this design, our job was that of repetition — the purchase, preparation, transport to the site, and placing of the same materials in the same relationship, over and over. It was as Shreve the architect said, like an assembly line — the assembly of standard parts.

PAUL STARRETT, *CHANGING THE SKYLINE* 296 (1938).

129. MAYER & WADE, *supra* note 90, at 192; III PIERCE, *supra* note 84, 503; MEL SCOTT, *AMERICAN CITY PLANNING SINCE 1890*, at 31 (1969).

130. III PIERCE, *supra* note 84, at 503. Like the gridiron plan, the "Roman" architectural style of the fair used "stereotyped canons and rules" that reduced the number of choices and resulted in a "noncommittal quality." MUMFORD, *supra* note 32, at 57-58.

131. HENRY ADAMS, *THE EDUCATION OF HENRY ADAMS* 340-41 (1918).

132. MAYER & WADE, *supra* note 90, at 196-99.

growth and development of a nation that was losing its frontier.¹³³ Americans were beginning to think about being confined within the boundaries of the land they already occupied, and were beginning to wonder whether they needed to live in an urban environment in which "long, winding trails of thick black smoke continued to envelop and besmutch the city."¹³⁴ Although scholars disagree about whether the Chicago world's fair was the original catalyst for the city planning movement,¹³⁵ it at least caused people to ask themselves why they couldn't be living in their own White City instead of sooty, polluted environments that characterized big cities of the late nineteenth century.¹³⁶

The chief architect of the world's fair was Daniel Burnham.¹³⁷ When the fair ended, many Chicago business leaders wanted to see whether the city could capture permanently some of the image that the White City had created for the city.¹³⁸ The Commercial Club, a group of the city's leading business leaders, decided to engage Burnham to prepare a master plan for the city.¹³⁹

133. An obscure historian from the University of Wisconsin, who was among those invited to a symposium on American history during the fair, used the occasion to outline for the first time a soon to be famous thesis that the frontier was the key element in American history and that the American's ability to move continually westward was a character-determining feature. Frederick J. Turner, *The Significance of the Frontier in American History*, in *THE TURNER THESIS CONCERNING THE ROLE OF THE FRONTIER IN AMERICAN HISTORY* 3 (George R. Taylor ed., 3d ed. 1972).

134. III PIERCE, *supra* note 84, at 320-22; see MUMFORD, *supra* note 32, at 89; SEYMOUR I. TOLL, *ZONED AMERICAN* 118-19 (1969).

135. See, e.g., CHRISTINE M. BOYER, *DREAMING THE RATIONAL CITY* 46 (1983); TOLL, *supra* note 134, at 118-19.

136. MAYER & WADE, *supra* note 90, at 193; III PIERCE, *supra* note 84, at 511-12. Some urban historians believe it aroused unrealistic expectations: "the evil of the World's Fair triumph was that it suggested to the civic enthusiast that every city might become a fair: it introduced the notion of the City Beautiful as a sort of municipal cosmetic." MUMFORD, *supra* note 32, at 59. *But see* WILLIAM H. WILSON, *THE CITY BEAUTIFUL MOVEMENT* 64 (1989) ("In sum, the World's Columbian Exposition was an immediate stimulant to professional artistic activity. To professionals and nonprofessionals alike it was a powerful statement of American scale, beauty, festival, and organization."). The Columbian Exposition served as the prototype for the whole series of similar world's fairs by cities all over America during the next two decades. G.H. EDGELL, *THE AMERICAN ARCHITECTURE OF TODAY* 49 (1928).

137. Sally A. Chappell, *Chicago Issues: The Enduring Power of a Plan*, in *THE PLAN OF CHICAGO, 1909-79*, at 67 (John Zukowsky ed., 1979); SCOTT, *supra* note 129, at 35-36.

138. Robert L. Wrigley, Jr., *The Plan of Chicago*, in *INTRODUCTION TO PLANNING HISTORY IN THE UNITED STATES* 58, 60 (Donald A. Krueckberg ed., 1983).

139. SCOTT, *supra* note 129, at 101-02.

City planning as envisaged by Burnham and Chicago's business leaders of the turn of the century bore little relation to city planning as practiced today. Lewis Mumford called it "baroque planning" for which the urban model was Paris and the heroes were Louis XIV, who laid out the initial city plan, and the Napoleons, who demolished thousands of buildings to open the way for the grand boulevards.¹⁴⁰ Like Hausmann, Burnham saw the city plan as a master plan for public works.¹⁴¹ The plan that emerged from the Commercial Club in 1909 was a proposal for a series of engineering *tours de force*. The city's solid wastes would be dumped into the lake to form the foundation for a continuous string of lakefront parks. A ring of broad boulevards would provide a parklike passageway through the residential neighborhoods. The harbor would be redesigned and opened up. And a residential neighborhood would be demolished and transformed into a civic center.¹⁴²

The Burnham plan differs from modern planning because it made little attempt to regulate or even project future private land uses.¹⁴³ In modern planning terminology, it would have been classified as a public facilities element of a comprehensive plan.¹⁴⁴ Like many such plans, its unspoken premise was that "no barriers should be placed in the way of indefinite urban expansion,"¹⁴⁵ and Chicago's business

140. LEWIS MUMFORD, *THE CITY IN HISTORY* 400-01 (1961); see WALTER D. MOODY, *WACKER'S MANUAL OF THE PLAN OF CHICAGO* 11 (1911) ("Napoleon . . . is honored in the memory of the French people today quite as much for what he did for their beloved Paris as he is admired in their memory because of his military genius."); see also III CURREY, *supra* note 59, at 369.

141. John Zukowsky, *Chicago Plan Drawings: Provenance & Checklists in THE PLAN OF CHICAGO*, *supra* note 137, at 29.

142. The faith in technology to solve urban problems was still present at the next Chicago World's Fair, in 1933, where one of the subtitles of the guidebook was "Science Finds, Industry Applies, Man Conforms." RENE J. DUBOS, *THE WOING OF EARTH* 140-41 (1980); see also HENRY J. SMITH, *CHICAGO'S GREAT CENTURY, 1833-1933*, at 190 (1933).

143. RICHARD E. FOGLESONG, *PLANNING THE CAPITALIST CITY* 209 (1986); ANDREW L. KING, *LAW & LAND USE IN CHICAGO* 318 (1986); ANTHONY SUTCLIFFE, *TOWARD THE PLANNED CITY* 108 (1981). The Burnham plan exhibited "no concern for the neighborhood as an integral unit, no regard for family housing, no sufficient conception of the ordering of business and industry themselves as a necessary part of any larger achievement of urban order." MUMFORD, *supra* note 140, at 401; see GILBERT, *supra* note 112, at 217-18.

144. Wrigley, *supra* note 138, at 69. On the other hand, the planners of the day were far ahead of today's planners in communication techniques. The children in Chicago's schools studied the Burnham plan throughout the 1920s. DANA F. WHITE, *THE URBANISTS, 1865-1915*, at 257 (1989); Wrigley, *supra*, at 64-69.

145. DANIEL R. MANDELKER, *THE ZONING DILEMMA* 41 (1971); see CHAPPELL,

leaders supported numerous bond issues to finance the improvements called for by the Burnham plan.¹⁴⁶

If we could have taken a snapshot of Illinois at this point in history we would have seen a landscape of square farms in which the landowners had made substantial and productive investments, the value of which was enhanced by the ability of Chicago business leaders to convert the produce of the land into tradable commodities.¹⁴⁷ One section of farmland looked much like any other section, and this agricultural land was itself a tradable commodity that had been used to finance the state's major transportation facilities.¹⁴⁸ Chicago and the state's other urban centers were laid out in a miniature version of the gridiron plan established by the Northwest Ordinance.¹⁴⁹ Since any physical defects of the land could undoubtedly be overcome by whatever new engineering miracles were needed, the expansion of this urban framework had continued indefinitely and might go on forever: "as the lakes and sea in front of her are insatiable, so the land behind her is inexhaustible."¹⁵⁰ Chicago was, after all, the seat of an inland empire.

While other states shared some of the attributes that characterized Illinoisans' image of themselves, no other state combined the sweep of uniformly platted flat land and a dynamic city that seemed capable of infinitely replicating itself square block after square block. In his study of Illinois literature, Donald Bray has concluded that "the primal facts of Illinois literature, as of Illinois life, are platted

supra note 137, at 14; WARNER, *supra* note 68, at 111-12; SCOTT, *supra* note 129, at 106. Lewis Mumford wrote that, like Napoleon's plans, Burnham's "served well the bankers and speculators who profited by the subsequent increase of ground rents and building gains." MUMFORD, *supra* note 140, at 400.

146. SCOTT, *supra* note 129, at 138-40; SMITH, *supra* note 142, at 149-51. The assumption was that increased property values would pay the increased taxes painlessly. BOYER, *supra* note 135, at 78-79. Over the next twenty years the lakefront parks proposed by Burnham were laid out according to his plans; some of the boulevards and harbor improvements were completed but others were not; the proposed civic center never aroused enthusiasm; its site is now occupied by the interchange of the Kennedy, Eisenhower and Ryan expressways. Wrigley, *supra* note 138, at 70; CHAPPELL, *supra* note 137, at 8, 12; Charles E. Merriam, City Planning in Chicago, Proc. 9th Ann. Conf. on City Planning. The economic downturn of 1929 brought an end to new public works projects, and when the depression ended the Burnham plan was largely forgotten. See ROBERT A. WALKER, THE PLANNING FUNCTION IN URBAN GOVERNMENT 223-64 (1941).

147. CRONON, *supra* note 9, at 114-32.

148. See *supra* notes 89-93.

149. See *supra* notes 71-72.

150. See *supra* notes 97-117. KIRKLAND, *supra* note 61, at 227.

farmlands and the City of Chicago.”¹⁵¹ It would not be surprising to find that these primal facts had influenced the attitude of Illinoisans toward the legal rules that should govern the development of land.

IV. “WELL RECOGNIZED BUSINESS POLICY”

A. HOW CITIES GROW

At this point it is appropriate to set aside the physical history of Illinois and Chicago and step back into the nineteenth century to look at the conceptual thinking that eventually led to zoning. The adoption of zoning was stimulated by people who believed there was a need to control the growth of cities. But how did they think that cities grew?

In nineteenth century America no one published any analysis of the principles of urban growth. Why did cities expand in one direction but not another? Why was retailing attracted to certain neighborhoods and not others? Which areas would provide the most desirable residential sites? No one seems to have attempted to provide general hypotheses to answer these questions.¹⁵²

Similarly, no one proposed any prescriptive rules to govern the ways cities grow. The absence of any empirical analyses of such issues certainly makes it understandable that no theory of “proper” urban form appears in the literature. Although many towns were planned and built as complete entities during this period, as John Reps has made clear in his extensive chronicles of the subject, the principles of their design and the rules that should govern their expansion were not expounded in the form of any general theory.¹⁵³ Nor did anyone seek to explain the patterns that developed as unplanned cities grew. During the nineteenth century the growth of American cities was dramatic, and the effects of that growth were the subject of an extensive literature, but the principles that might explain how they grew were barely explored.¹⁵⁴

Despite the lack of any theoretical foundation, the courts of the period were forced to make decisions about how cities should grow

151. BRAY, *supra* note 26, at 7.

152. WILLIAM ALONSO, *LOCATION & LAND USE* 2-5 (1964). Geographers were attempting to devise theories about why cities became established at particular locations, but these theories did not address the patterns that developed within the cities themselves. See, e.g., CRONON, *supra* note 9, at 48-51.

153. See generally REPS, *supra* note 19, at 302.

154. See generally WEBER, *supra* note 110. See also RALPH THOMLINSON, *URBAN STRUCTURE* 143 (1969).

in the course of interpreting the old English common law concept of nuisance and in determining the validity of private attempts to control urban growth through deed restrictions. English nuisance law made it tortious, and occasionally criminal, to undertake certain activities that adversely affected neighboring property, but there were no general standards by which the degree of adverse effect was measured. The courts were forced to build up such standards on a case by case basis.¹⁵⁵

The Illinois Supreme Court began to expound a few principles to help future litigants decide such cases as early as 1869. Cattle pens, said the court, should be erected "far removed from populous neighborhoods,"¹⁵⁶ but "the owner of a costly house, upon a fashionable street, might regret to see the proprietor of an adjoining lot erect thereon a row of mean and unsightly tenements, but he would have no legal right of complaint."¹⁵⁷

Although many of the opinions in nuisance cases purported to be the application of abstract latin maxims,¹⁵⁸ commentators began to be able to derive certain geographical indicators that were helpful in predicting the result in such cases. In his recent analysis of American nuisance cases of the period, Richard Epstein characterized two of these principles as the "live and let live" principle and the "locality" principle.¹⁵⁹ The live and let live principle meant that it was not a nuisance to do what other people in the neighborhood would reasonably expect to be doing.¹⁶⁰ Thus the Illinois court declined to rule for the plaintiff who brought a case against a neighboring bowling alley, saying that "choosing to live in a great city, she must take such life with the inevitable concomitant of city amusements."¹⁶¹ And the Illinois Supreme Court held that a plaintiff had no right to be protected against neighboring construction that prevented light and air from reaching his windows because "[s]uch a doctrine is not applicable in our growing cities and villages"¹⁶²

155. See generally ROBERT C. ELLICKSON & A. DAN TARLOCK, *LAND-USE CONTROLS: CASES & MATERIALS* 564-65, 570 (1981).

156. *Illinois Central Ry. v. Grabill*, 50 Ill. 241, 245 (1869).

157. *Cooper v. Randall*, 53 Ill. 24, 27 (1869).

158. See, e.g., *Laflin-Rand Powder Co. v. Tearney*, 23 N.E. 389 (Ill. 1890).

159. Richard A. Epstein, *Nuisance Law: Corrective Justice & Its Utilization Constraints*, 8 J. LEGAL STUD. 49, 82-90 (1979). For a summary of other economics-oriented commentary on nuisance law, see Jeff L. Levin, *Boomer & the American Law of Nuisance: Past Present & Future*, 54 ALB. L. REV. 189, 236-76 (1992).

160. Epstein, *supra* note 159, at 82-86.

161. *Wende v. Sozialer Turn Verein*, 66 Ill. App. 591, 591 (1896).

162. *Guest v. Reynolds*, 68 Ill. 478, 488 (1873).

The locality principle allowed the courts to use the character of the neighborhood to decide that an activity might be a nuisance in one neighborhood but not in another.¹⁶³ The Illinois courts relied heavily on such distinctions.¹⁶⁴ Thus, for example, a plaintiff who built a tenement in an industrial area could not enjoin the operation of a neighboring tannery.¹⁶⁵ But when a building for unloading coal from railroad cars was constructed in a "locality thickly settled," the "structure, though not a nuisance *per se*, became such by reason of the particular locality in which it was situated."¹⁶⁶ Thus the court's nuisance opinions frequently involved close attention to the factual pattern of land uses in the neighborhood.¹⁶⁷

In his detailed study of the Illinois cases of the period, Andrew J. King found that the courts not only used nuisance law to enforce what he characterized as "natural zoning," but that they also interpreted private deed restrictions in a manner consistent with the goal of "uniformity of activities throughout any given area."¹⁶⁸ The developers of nineteenth century subdivisions frequently tried to ensure purchasers of lots that the area would remain uniformly residential by attaching deed restrictions that purported to prevent future lot

163. Epstein, *supra* note 159, at 87-90; see R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 20-23 (1960), reprinted in *THE FIRM, THE MARKET, & THE LAW* 157-85 (1984).

164. The gravity of the court's jurisprudence was best conveyed in a case holding invalid a statute limiting the expansion of Rose Hill Cemetery; the court pointed out that

the lands of this company are well selected, and are situated at a proper distance from the populous part of the city, in a sparsely settled community. . . . If these lands can not be used, a very grave question would arise — where would the city find a burial place for its dead?

Town of Lake View v. Rose Hill Cemetery Co., 70 Ill. 191, 198 (1873).

165. *Lambeau v. Lewinski*, 47 Ill. App. 656, 659 (1893).

166. *Wiley v. Elwood*, 25 N.E. 570, 573 (Ill. 1890).

167. See also a recent analysis of those nineteenth century New York cases that used a similar "fact-bound inquiry" in Louise A. Halper, *Nuisance, Courts & Markets in the New York Court of Appeals, 1850-1915*, 54 ALB. L. REV. 301, 334 (1990).

168. KING, *supra* note 143, at 40-41, 50-52, 96-97. Professor Epstein suggests that such principles were designed to provide "implicit in-kind compensation" based on "the uniformity of activities throughout any given area," and that this satisfied a utilitarian need to ensure that the benefits of new development offset harms. Epstein, *supra* note 159, at 88-90. Some commentators have argued that land speculators were the prime beneficiaries of the nineteenth century nuisance standards. Robert A. Williams, Jr., *Euclid's Lochnerian Legacy*, in *ZONING & THE AMERICAN DREAM* 278 (Charles M. Haar & Jerold S. Keyden eds., 1989).

owners from building anything but residential structures,¹⁶⁹ a practice that the Illinois Supreme Court grudgingly approved, but not without expressing its doubts about the practice:

In this country real estate is an article of commerce. The uses to which it should be devoted are constantly changing as the business of the country increases, and as its new wants are developed. Hence it is contrary to the *well-recognized business policy* of [this] country [to restrict the use of real estate and] all doubts should . . . be resolved in favor of a free use of property, and against restrictions.¹⁷⁰

To implement this "well recognized business policy" the court used two principles analogous to the live and let live and locality rules used in nuisance cases. It applied estoppel against any residential lot owner who had previously failed to seek relief against other violations of the residential restrictions and later sought to do so, and it used a "changing neighborhood" rule to invalidate residential restrictions if the surrounding neighborhood had originally been residential but subsequently became characterized by non-residential uses.¹⁷¹

Implementation of all of these rules required the court to enquire into the details of the existing uses in the neighborhood of the property at issue, and the court began to use such analysis of existing land uses to construe even the continuing validity of easements of right of way.¹⁷² For example, when a landowner conveyed the part of his property adjoining Halsted Street to another person and retained an access right through the property conveyed to reach Halsted Street, which was then the westernmost street constructed in Chicago, the court held that blockage of the right of way could no longer be enjoined once the gridiron street plan had been extended westward to

169. HAROLD L. REEVE, ILLINOIS REAL ESTATE LAW 96-97 (1929).

170. *Hutchinson v. Ulrich*, 34 N.E. 556, 557 (Ill. 1893) (emphasis added). As the *Hutchinson* case illustrates, the Illinois court was frank in expressing its admiration of the well recognized business policy that land was a commodity whose free use should be presumed. See KING, *supra* note 143, at 45-46. Other state courts expressed similar hostility. See Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, & Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 716 (1973).

171. KING, *supra* note 143, at 49-50. By the late 1920s the court was beginning to relax its rigid enforcement of these defenses to the enforcement of deed restrictions. *Id.* at 69-70. But an Illinois treatise writer of the period could still say that restrictions are "not favored" and "all doubts are to be resolved against them." REEVE, *supra* note 169, at 96.

172. KING, *supra* note 143, at 50-52.

provide the plaintiff with access to a parallel street.¹⁷³ In this manner the court became accustomed to making its own assessment of existing conditions in a neighborhood in order to evaluate potential nuisances and decide the validity of servitudes.

B. STREET SMART

It was obvious to the courts, as it was to other observers, that the unrestricted free market characteristic of the nineteenth century had not produced a random pattern of urban growth. Cities developed distinct neighborhoods in which different land use patterns emerged, some perhaps being typified by tenements, some by industries, others by retailing.¹⁷⁴ But to implement intelligently the rules they had created the judges had to predict how neighborhoods would change in the future. What basis did they have for such predictions?

People who make their living selling or developing real estate have always credited themselves with being "street smart," i.e., with an understanding of what prospective buyers are seeking and how buyer demand will influence the future supply and location of new development.¹⁷⁵ Most nineteenth century real estate developers kept their insights to themselves, and not until 1903 does the literature record an effort to translate their understanding of a demand-driven market into a coherent theory about the reasons why cities grow in particular geographic patterns.¹⁷⁶ The pioneer effort was written by Richard Hurd, a New Jersey real estate investor, and published by the New York Real Estate Journal.¹⁷⁷

173. *Oswald v. Wolf*, 21 N.E. 839 (Ill. 1889).

174. HOYT, *supra* note 54, at 6; see Andrew J. Cappel, Note, *A Walk Along Willow: Patterns of Land Use Coordination in Pre-Zoning New Haven (1870-1926)*, 101 YALE L.J. 617, 630-31 (1991). For an earlier study of neighborhood characteristics in New Haven, see Maurice R. Davie, *The Pattern of Urban Growth*, in *STUDIES IN THE SCIENCE OF SOCIETY* 133 (George Murdock ed., 1937).

175. Joel Garreau's perceptive analysis of the attitudes of modern day developers undoubtedly could equally have applied to those of a century ago. Because they think they have figured out the rules of human nature, he says, developers are perplexed by planners and bureaucrats who are unfamiliar with the market principles on which the laws of human nature are really based and thus "have self-evidently preposterous ideas about how human nature works in the real world." But when their psychological insights occasionally produce, for example, a five year oversupply of office buildings, they may acknowledge that human nature "has an unsettling habit of appearing rational only in hindsight." JOEL GARREAU, *EDGE CITY* 463-71 (1991).

176. ALONSO, *supra* note 152, at 2-5; THOMLINSON, *supra* note 154, at 143.

177. RICHARD M. HURD, *PRINCIPALS OF CITY LAND VALUES* (1903); see ALONSO, *supra* note 152, at 5.

Hurd believed that the normal workings of the market led to a natural grouping of land uses as cities grew. He propounded a radial theory by which those land uses that could afford to pay the highest prices for land would concentrate in the central hub of the city and, to a lesser degree, along the roads that radiate out from that hub.¹⁷⁸ Hurd sought to explain urban growth patterns, not to change them. He stressed the inevitability of the market's response to a predictable set of consumer demands, and warned against attempts to direct growth in ways inconsistent with natural forces.¹⁷⁹ Hurd's book was not widely distributed and apparently attracted little attention.¹⁸⁰

At about this time a journalist named Robert Ezra Park, who had spent the first decade of his career covering the "Darwinian struggle" of the immigrants' life in the big cities, decided to pursue an academic career in order to find explanations for the urban conditions he had witnessed.¹⁸¹ He eventually joined the faculty of the University of Chicago, where under his leadership the University became the renowned international leader in the field of urban sociology.¹⁸²

Like Hurd, Park approached the problem of urban growth more as an analyst than a reformer.¹⁸³ But his vision was broader than his predecessors. In 1915 he wrote a catalytic article setting out the wide range of urban issues that would occupy him and an increasing number of colleagues and students for the next 20 years. Why, for example, are there slums? Why do neighborhoods change? Why does segrega-

178. HURD, *supra* note 177, at 58-59; *see also* WEBER, *supra* note 110, at 467.

179. HURD, *supra* note 177, at 149; *see* BOYER, *supra* note 135, at 85-86. For a current view of the issue of whether the homogenous residential subdivision is demand-driven, *see* ANN D. KEATING, *BUILDING CHICAGO* 124 (1988).

180. *See* ALONSO, *supra* note 152, at 6-7.

181. WINIFRED RAUSHENBUSH, ROBERT E. PARK: BIOGRAPHY OF A SOCIOLOGIST 29-35 (1979); *see* BRIAN J. BERRY & JOHN D. KASARDA, *CONTEMPORARY URBAN ECOLOGY* 4 (1977); GILBERT, *supra* note 112, at 225-26.

182. *See generally* MARTIN BULMER, *THE CHICAGO SCHOOL OF SOCIOLOGY* (1984); *see also* ROBERT E.L. FARIS, *CHICAGO SOCIOLOGY 1920-1932*, at 20 (1967); WHITE, *supra* note 144, at 262-63; BERRY & KASARDA, *supra* note 181, at 3; FRED M. MATTHEWS, *QUEST FOR AN AMERICAN SOCIOLOGY* 89 (1977). At the University of Illinois, on the other hand, social scientists during this period focused on a "philosophy of history" approach and gave little consideration to the type of urban issue that interested the Chicago school. L.L. BERNARD & JESSIE BERNARD, *ORIGINS OF AMERICAN SOCIOLOGY* 645-47 (1943).

183. One student later recalled that Park said "the greatest damage done to the city of Chicago was not the product of corrupt politicians or criminals but of women reformers. . . ." RAUSHENBUSH, *supra* note 181, at 97; *see also* MILLA A. ALIHAN, *SOCIAL ECOLOGY* 126-35 (1938); BULMER, *supra* note 182, at 68; MATTHEWS, *supra* note 182, at 112.

tion exist?¹⁸⁴ Even today, one can understand how the broad scope of Park's catalogue of urban issues inspired an entire generation of students.

Park's methodology quantified and mapped structural conditions and behavioral patterns to see how neighborhoods differed from each other and how those differences changed over time.¹⁸⁵ Based in Chicago, he and his colleagues and students concentrated their data-gathering efforts in the Chicago area, though his students eventually spread throughout the country.¹⁸⁶

As he observed neighborhoods develop and change, Park increasingly believed that deterministic and predictable forces were directing urban growth.¹⁸⁷ In searching for a pattern that might explain the ways cities changed over time, he became fascinated with the theories that were being developed in a new branch of the biological sciences known as ecology.¹⁸⁸

Ecologists were studying the way natural habitats changed over time. For example, a pine forest burned and new shrubs sprang up, to be overshadowed a decade later by aspens, and in another decade the aspens were again replaced by pine. This phenomenon they called "succession" and the causative factor "dominance."¹⁸⁹ Pines, though slow to grow, would ultimately dominate the aspens and shrubs, thus creating a natural balance until some cataclysm forced a readjustment. This illustration oversimplifies the ecologists' theories, but it was the simplicity that attracted Park. Park began expounding a theory that the city was a product of nature — particularly human nature. He called his theory "human ecology."¹⁹⁰

C. A PSYCHOPHYSICAL MECHANISM

The human ecologists looked at the city as if it were a living thing. Park thought of the city as a "kind of psychophysical mecha-

184. Robert E. Park, *The City: Suggestion for the Investigation of Human Behavior in the Urban Environment*, reprinted in ROBERT E. PARK & ERNEST BURGESS, *THE CITY* 1 (1925); see also II *THE COLLECTED PAPERS OF ROBERT EZRA PARK* 119 (Hughes et al. eds., 1952) [hereinafter *COLLECTED PAPERS*].

185. BULMER, *supra* note 182, at 99-108; MATTHEWS, *supra* note 182, at 129.

186. MATTHEWS, *supra* note 182, at 127.

187. Park, *The City*, *supra* note 184, at 4-5; II *COLLECTED PAPERS*, *supra* note 184, at 177; see MATTHEWS, *supra* note 182, at 120.

188. MATTHEWS, *supra* note 182, at 138-39; RAUSHENBUSH, *supra* note 181, at 79-80.

189. II *COLLECTED PAPERS*, *supra* note 184, at 151; see ALIHAN, *supra* note 183, at 118-25.

190. FARIS, *supra* note 182, at 51; R.D. McKenzie, *The Ecological Approach to the Study of the Human Community*, in PARK, *supra* note 184, at 68, 73-74.

nism" that "possesses a moral as well as a physical origination" and has a "life guide of its own."¹⁹¹ He and his colleagues sought to analyze its behavior so that it became more predictable, but from the beginning they doubted their ability to influence significantly future changes in the behavior of the urban organism. Park believed that personal tastes and convenience, vocational and economic interests, "infallibly tend to segregate and thus to classify the populations of great cities," and in this way the city "acquires an organization and distribution of population which is neither designed nor controlled."¹⁹²

As the study of human ecology progressed at the University of Chicago this tendency toward determinism became more pronounced.¹⁹³ The sociologists saw urban development as a process by which "a uniform cost type of structure" gradually dominates a neighborhood and eliminates any other types that vary widely from the norm.¹⁹⁴ They called such neighborhoods "natural areas," borrowing the term from plant ecology.¹⁹⁵ One of Park's colleagues, Ernest W. Burgess, was credited with authorship of a paper describing the theory of urban growth that had evolved from the Chicago faculty.¹⁹⁶ Burgess delved deeply into biological symbolism in his description of the processes by which cities grow. He saw urban growth as a result of "organization and disorganization analogous to

191. McKenzie, *supra* note 190, at 71; Park, *supra* note 184, at 2-4.

192. Park, *supra* note 184, at 5; see also Harvey M. Zorbaugh, *The Natural Areas of the City*, in *THE URBAN COMMUNITY* 224 (Ernest W. Burgess ed., 1926); McKenzie, *supra* note 190, at 169.

193. See, e.g., Zorbaugh, *supra* note 192, at 272-73.

194. McKenzie, *supra* note 190, at 77.

195. *Id.*; see MATTHEWS, *supra* note 182, at 140; FARIS, *supra* note 182, at 59-60; LEON BRAMSON, *THE POLITICAL CONTEXT OF SOCIOLOGY* 87-88 (1961). The biologist who most influenced Park was Frederic Clements of the University of Nebraska. His research in the ecological changes in the grassland habitats led him to propose theories of succession and climax that became quite popular among some ecologists of that period. Ronald Tobey, *American Grassland Ecology, 1895-1955: The Life Cycle of a Professional Research Community*, in *HISTORY OF AMERICAN ECOLOGY* 4 (Frank N. Egerton ed., 1977). Clements' theories were controversial. He was committed to the idea that vegetative communities were holistic organisms. ROBERT P. MCINTOSH, *THE BACKGROUND OF ECOLOGY* 43 (1985). H.C. Coles, the specialist in ecology on the faculty of the University of Chicago, shared some but not all of Clements' views. *Id.* at 82-83, 264. Charles Adams of the University of Illinois also emphasized that the "orderly sequence of external nature" is fundamentally a simple conception" CHARLES C. ADAMS, *GUIDE TO THE STUDY OF ANIMAL ECOLOGY* 83 (1913); see also THOMAS R. DUNLAP, *SAVING AMERICA'S WILDLIFE* 44-45 (1988); RODERICK F. NASH, *THE RIGHTS OF NATURE* 56-59 (1989).

196. Ernest W. Burgess, *The Growth of a City: An Introduction to a Research Project*, in PARK & BURGESS, *supra* note 184.

the anabolic and katabolic processes of metabolism in the body."¹⁹⁷ The constant changes taking place he saw as "mobility" which was "a measure both of expansion and metabolism, susceptible to precise quantitative formulation, so that it may be regarded almost literally as the pulse of the community."¹⁹⁸ This mobility caused the inevitable "invasion" of neighborhoods, just as one plant community invaded another in a process known as succession.¹⁹⁹

Burgess saw the result of these processes as a city made up of five concentric circles, which constituted both "successive zones of urban extension and the types of areas differentiated in the process of expansion." These were (1) the downtown, (2) the transition zone, (3) the zone of workers' homes, (4) the exclusive residential area, and (5) the commuters' zone.²⁰⁰ As the city grew, each inner zone tended to extend its area by the invasion of the next outer zone.²⁰¹

The popular appeal of the human ecologists' theories stemmed from the absolution from blame that they provided. If the city "infallibly" creates slums and segregation, how can individuals be responsible for having caused these problems? To those who resented the urban reformers of the day, the human ecologists provided an academically defensible refuge.²⁰² The fatalism of Park and the other human ecologists at times seemed like a Panglossian parody of their own theories:

197. *Id.* at 53. Some commentators have found analogies to Burgess' theories in the works of the ancient greek philosophers. RALIEGH BARLOWE, *LAND RESOURCE ECONOMICS* 244 (1986).

198. Burgess, *supra* note 196, at 61.

199. The term "succession" is still sometimes used in urban land economics. BARLOWE, *supra* note 197, at 156-57.

200. Burgess, *supra* note 196, at 50; *see also* Zorbaugh, *supra* note 192, at 221. The "more efficient elements of the population" gravitate "in higher ratios than the weaker economic groups to the margins of the city" and the "wholesomeness of the urban environment improves with the distance from the center of the city" R.D. MCKENZIE, *THE METROPOLITAN COMMUNITY* 190 (1933).

201. Burgess, *supra* note 196, at 51-52. Burgess recognized that his ideal model would have many variations. FARIS, *supra* note 182, at 60.

202. Park wrote, for example, that the English dominance in South Africa was the consequence of an "inexorable historical process" by which "land eventually goes to the race or people that can get the most out of it." Robert E. Park, *Succession, an Ecological Concept*, *AM. SOC. REV.* 171, 174; *see also* SAM B. WARNER, *THE URBAN WILDERNESS* 102-12 (1972); Joe R. Feagin, *Arenas of Conflict: Zoning & Land Use Reform in Critical Political-Economic Perspective*, in *ZONING & THE AMERICAN DREAM*, *supra* note 168, at 73, 74-76. J.B. Jackson said that the spirit of the midwest was "unquestioning acceptance of the authority of a revealed truth: the truth of the Bible, the truth of mathematical formulas and rational philosophy." Jackson, *supra* note 27, at 162.

"But Negroes, like dentists, tend on the whole to go where they can make a living and where they are permitted to live, and it is probably good for society on the whole that each of us should live where he can rather than where he would choose to live."²⁰³

One of the most widely read members of the Chicago school was Harvey Zorbaugh, whose book *The Gold Coast and the Slum* was popular in Chicago and elsewhere as the 1920's ended.²⁰⁴ Zorbaugh was scornful of those who sought to change the city by "man's fiats."²⁰⁵ He argued that human ecology segregates the city over natural areas into natural groups according to definable processes, and that "it is futile to impose a plan upon a city which involves the attempt to control land values and the natural groupings of population."²⁰⁶ Attempts to reform cities, he argued, would accomplish little.²⁰⁷

But the human ecologists were not all pure fatalists. They saw themselves as "tough-minded" sociologists "intent on discovering the laws of social life in order to be able to predict and ultimately control the problems of human existence."²⁰⁸ They shared the civic enthusiasm and booster spirit of Chicago, admiring its engineering accomplishments and even the apparent disorder produced by its rapid growth.²⁰⁹ As the son of one of the school's faculty later noted, "stimulation

203. Park, *supra* note 184, at 124; see JAMES E. VANCE, *THE SCENE OF MAN* 393 (1977); see also MCKENZIE, *supra* note 190, at 76. Compare Richard Babcock's reference to the judge who said that a community "is raw material in the hands of the invisible architect who shapes it according to the needs of the environment and the best interest of all the inhabitants in the area." See RICHARD F. BABCOCK, *THE ZONING GAME* 102 (1966) ("Shades of social Darwinism"). For a discussion of the attitude of the "real estate fraternity" toward racial minorities during this period see CHARLES ABRAMS, *FORBIDDEN NEIGHBORS* 158-67 (1955).

204. HARVEY W. ZORBAUGH, *GOLD COAST & SLUM* (1929); see FARIS, *supra* note 182, at 83. Marxist scholar Edward Soja argues that the zonation of neighborhoods by class was a "hidden instrumentality" of capitalism that the Chicago School of urban ecologists uncovered but then buried "under an obfuscating ideology of naturalism and/or cultural relativism." EDWARD W. SOJA, *POSTMODERN GEOGRAPHIES* 178 (1989).

205. Zorbaugh, *supra* note 192, at 219.

206. *Id.* at 228-29.

207. *Id.* at 269.

208. BRAMSON, *supra* note 195, at 88; see BULMER, *supra* note 182, at 39, 68; Feagin, *supra* note 202, at 83.

209. FARIS, *supra* note 182, at 21. One of Chicago's "boosters" had earlier written that "Chicago is often said to have been built by nature rather than by any human interference." KIRKLAND, *supra* note 61, at 227.

for creativity permeated the whole Chicago environment of the period, to attract, to support, and perhaps to develop the men and activities needed for the construction of the new science [of sociology]."²¹⁰ In turn, the Chicago school of sociologists viewed Chicago as "the ideal-typical metropolis, the crystallization of pure urbanism."²¹¹ They saw the development of Chicago, which was on a site that lacked physical barriers to market forces, as creating a universal pattern of natural areas.²¹²

D. SAILING WITH THE TIDE

Although they disdained "reformers," the Chicago school did not reject all attempts to influence the growth of the city, as long as those attempts were undertaken by "practical men." Zorbaugh put it most succinctly in his widely read 1929 book: "While reformers were vainly attempting to stem the tides of city life," Zorbaugh wrote, "realtors, engineers of public utilities, city-planning and zoning commissions, students in universities, and others interested in predicting the future of the city were discovering much about the nature of these tides, about the ways in which the city grows."²¹³ He said that there was a "realization on the part of practical men that the growth of the city, left uncontrolled, was involving city governments and public utilities in a maze of well-nigh unsolvable problems." These practical men found the city resistant to their efforts to control growth:

[B]ut, finding it resistant, they turned to the study of the city in the effort to understand its resistance. Out of these studies has arisen a new city plan, a plan that is possible because it is based upon a recognition of the natural process of the city's growth, a plan that is the dream not of an ideal, but of a real, city [and] begins to give the city a conception of itself — a self-awareness, a sense of its history and role, a vision of its future — in short, a personality.²¹⁴

210. FARIS, *supra* note 182, at 20; *see also* BULMER, *supra* note 182, at 190.

211. MATTHEWS, *supra* note 182, at 127.

212. *Id.* at 126-27, 142.

213. ZORBAUGH, *supra* note 204, at 270. He contrasted this practical planning with earlier, more idealistic planning that had failed because "the city resisted" it. *Id.* at 272; *see also* McKenzie, *supra* note 190, at 65.

214. ZORBAUGH, *supra* note 204, at 272-73; *see also* TOLL, *supra* note 134, at 195-98.

The city was susceptible to reform because it was akin to a living organism. Thoughtful citizens could control and direct its growth somewhat as they could manipulate other organisms genetically and environmentally.

WILSON, *supra* note 136, at 78.

The "practical men" to whom Zorbaugh referred were not an abstraction. Many real estate practitioners, economists and business leaders had become convinced that, as the economist Richard T. Ely put it, "The unregulated desire for profits from ownership of private property often leads to a short-sighted view."²¹⁵ The people who held these views thought of themselves as business-oriented, market-sensitive people who encouraged urban growth but thought they could improve it through minor adjustments.²¹⁶ "Zoning finds its economic justification," wrote Columbia economist Robert Murray Haig, "in that it is a useful device for ensuring an approximately just distribution of costs, of forcing each individual to bear his own expenses. Regional planning, based upon economic analysis and operating through zoning restrictions, is the intelligent method of bringing about a truly sound economic layout of the metropolis."²¹⁷

The advocates of zoning sought to distinguish themselves from the idealistic reformers whose radical ideas they blamed on either a malicious socialism or a naive ignorance of the way the world really worked. In an economy in which land was still a principal medium for the average person's investment, people who sold real estate wanted to give buyers realistic assurances that their structures would not lose value because they differed from others in the neighborhood.²¹⁸ It was these "practical men" who, during the same period that Park was founding the human ecology school, were promoting the adoption of zoning as a way of stabilizing natural areas and thereby maintaining property values.²¹⁹ Before examining the interac-

215. RICHARD T. ELY & EDWARD W. MOREHOUSE, *ELEMENTS OF LAND ECONOMICS* 86 (1931); see Harry H. Culver, *A Realtor's Viewpoint on Zoning, Present & Future*, in *ANNALS AM. ACAD. POL. & SOC. SCI.* 207, 209 (1931) (realtors expect "that those persons dealing with zoning shall be practical and sane. . ."); see also BOYER, *supra* note 135, at 153.

216. See, e.g., Alfred Bettman, *Constitutionality of Zoning*, 37 *HARV. L. REV.* 834, 840 (1924).

217. Robert M. Haig, *Toward an Understanding of the Metropolis: The Assignment of Activities to Areas in Urban Regions*, 40 *Q.J. OF ECON.* 402, 433-34 (1926).

218. TOLL, *supra* note 134, at 258-59 (1969). For a modern perspective, see GARREAU, *supra* note 175, at 280-81. Frank Lloyd Wright's ideas for "Broadacre City," conceived during this period, were a fairly accurate prediction of the way urban areas evolved after World War II. JONATHAN BARNETT, *THE ELUSIVE CITY* 84-85 (1986).

219. FOGLESONG, *supra* note 143, at 239; KING, *supra* note 143, at 393; BOYER, *supra* note 135, at 91; Garrett Power, *The Unwisdom of Allowing City Growth to Work its Own Destiny*, 47 *MD. L. REV.* 626, 642-48 (1988). Not everyone agreed that property values should remain high. Classical economists like David Ricardo and

tion of the human ecologists' theories and the zoning movement, however, it is important to review briefly the attitude of the Illinois courts toward earlier urban regulatory efforts.

V. PRACTICAL MEN

A. THE LIVERY STABLE SCAM

The City of Chicago had begun to experiment with regulatory measures to control some of the unpopular by-products of urban growth as early as the 1860's.²²⁰ The degree to which these regulations proved effective in practice, and the reception given to them by the courts, had a significant influence on the way that zoning in Illinois developed.

The history of land use regulations that preceded zoning in Illinois can be classified into three periods. First, beginning in the mid-nineteenth century was a period of "nuisance" regulations by which the cities tried to identify and control by ordinance those particular uses that they deemed to have the characteristics of nuisances.²²¹ The

Henry George thought that the limited supply of land meant that land needed to be categorized separately from labor and capital as elements of economic growth. See HERBERT HOVENKAMP, *ENTERPRISE & AMERICAN LAW* 187-90 (1991); ROBERT L. HEILBRONER, *THE WORLDLY PHILOSOPHERS* 83-84 (1972). This theory was criticized by economists such as the University of Chicago's renowned Frank Hyneman Knight. Frank H. Knight, *Fallacies in the Interpretation of Social Cost*, 38 Q.J. OF ECON. 582 (1924), reprinted in FRANK H. KNIGHT, *THE ETHICS OF COMPETITION & OTHER ESSAYS* 217 (1935). Knight argued that

[L]and is capital merely; defined in any realistic way, it presents an infinite variety of conditions as to maintenance and replacement requirements, and possibilities of increase in supply, as does any other general class of capital instruments.

FRANK H. KNIGHT, *ON THE HISTORY & METHOD OF ECONOMICS* 24 (1956).

220. See, e.g., *City of Chicago v. Rumpff*, 45 Ill. 90 (1867).

221. Andrew King has analyzed these nuisance cases in detail; see KING, *supra* note 143, at 123-154. He points out that the Illinois courts were heavily influenced by three principles of constitutional interpretation that were prevalent in the late nineteenth and early twentieth century: (1) the use of substantive due process to enforce ideas such as freedom of contract as symbolized by the *Lochner* opinion of the United States Supreme Court. See, e.g., *People v. Weiner*, 110 N.E. 870 (Ill. 1915) (holding invalid ban on sale of second hand mattresses); *Eden v. People*, 43 N.E. 1108 (Ill. 1896) (holding invalid mandatory Sunday closing of barber shops). Compare *Ritchie v. People*, 40 N.E. 454 (Ill. 1895) (holding invalid maximum eight-hour day for women) with *W.C. Ritchie & Co. v. Wayman*, 91 N.E. 695 (Ill. 1910) (upholding maximum 10 hour day for women); (2) the strict interpretation of statutes delegating power to municipalities, based on the court's emphatic rejection of "the

second period began with the invention of the "frontage consent" ordinance, which delegated to the owners of property in an individual block the power to reject the construction of certain land uses in that block, and ended with public disillusion with, and judicial rejection of, these ordinances in about 1912. From that point the third period began, and from then until the approval of zoning by the supreme courts of Illinois and United States in the mid-1920's, the attentions of Chicago's "practical men" were intensively devoted to the promotion of the concept of zoning. Their efforts were spent persuading the business community and the voting public that zoning was desirable, lobbying the legislature for a statute that the city could successfully implement, and convincing the courts that the basic idea of zoning was consistent with constitutional limitations.

Before reviewing this third period it is important to explain how the history of frontage consent ordinances affected later attitudes toward zoning. It should be kept in mind that Illinois courts in the late nineteenth century accepted the "well recognized business principle" that land was an important commodity, the uses of which would be constantly changing as business increases, and that these uses should be governed by the free market to the greatest extent possible.²²² The courts also seemed to accept the consensus of Hurd and other real estate practitioners that the operation of the free market in real estate should cause similar types of uses to cluster together in neighborhoods of relatively uniform character.²²³ These neighborhoods would migrate and change over time as their edges advanced and retracted, but it was hoped that the market would produce a relatively uniform pattern of uses within the neighborhood at any given time since such a pattern would maximize the aggregate value of property in the neighborhood by avoiding the value reduc-

false notion that a municipality has some indefinable element of sovereign power. . . ." *Nevins v. City of Peoria*, 41 Ill. 502, 509 (1866); see *City of Chicago v. Ross*, 100 N.E. 159 (Ill. 1912) (regulation of astrologers not authorized by statute authorizing regulation of "fraudulent practices"); BARNET HODES, *LAW & THE MODERN CITY* 36-41 (1937); SCHULTZ, *supra* note 48, at 66-75; REEVE, *supra* note 169, at 77; and (3) the refusal to accept aesthetics as a valid basis for regulation; see Comment, 9 ILL. L. REV. 141 (1914). Because each of these doctrines have been so thoroughly explored, and because Illinois' version of them was so similar to that expounded by other courts, they need no detailed exposition here. Suffice it to say that in combination they resulted in the invalidation of many, but not all, of the nuisance type regulations imposed by Illinois cities in the nineteenth and early twentieth centuries.

222. See *supra* notes 169-73.

223. KING, *supra* note 143, at 95-97.

tions that were assumed to be the result of "incompatible" neighboring uses.²²⁴

The flaw in this system, of course, was that the desired uniformity became a common good. All property owners would obtain a small benefit from its existence, but any individual might obtain a large benefit if he or she were among the first to violate it; this classic tragedy of the commons syndrome caused neighbors to eye each other nervously.²²⁵ Nervous neighbors were bad for the business of people who developed or sold real estate because the perception of security carries a high economic value, and nervousness lowers real estate prices.²²⁶

The Chicago Real Estate Board faced a classic example of this problem in what became known as the livery stable scam. In the late nineteenth century, most of the transportation on the streets of Chicago was by horse-drawn vehicle. The horses needed a place to reside when they were not working and this function was performed by the livery stable. Livery stables produced certain externalities that their neighbors often found undesirable. In addition to the accumulation of horse manure, the stables typically brought noise and lights late in the evening and early in the morning and created the nineteenth century equivalent of what we would call traffic and parking problems.²²⁷

The courts had struggled with the issue of how such stables should be treated under nuisance law. Typically, Illinois courts said that a stable was not a nuisance *per se* so they would not enjoin its construction but would wait until the stable was built and in operation before determining whether it turned out to be a nuisance and whether the neighbors would be entitled to damages or an injunction.²²⁸ Consequently, the threat to build a livery stable in a residential

224. See, e.g., W.L. Pollard, *Outline of the Law of Zoning in the United States*, in ANNALS AM. ACAD. OF POL. & SOC. SCI. 15, 16-17 (1931).

225. In his recent book ENTERPRISE & AMERICAN LAW, 1836-1937, Herbert Hovenkamp attributes "the Supreme Court's seemingly odd defections from liberty of contract in the land-use cases" to "the recognition that, because individual parcels are so dependent on the whole, a municipality is composed just as much of 'commons' as of individually owned property." HOVENKAMP, *supra* note 219, at 203-04.

226. Culver, *supra* note 215, at 211.

227. See, e.g., *Oehler v. Levy*, 139 Ill. App. 294 (1907). For the history of horse-drawn public transportation in Chicago see II JOHN MOSES & JOSEPH KIRKLAND, THE HISTORY OF CHICAGO 528-31 (1895).

228. *Sheldon v. Weeks*, 51 Ill. App. 314, 315 (1893); cf. *Robb v. Village of LaGrange*, 42 N.E. 77 (Ill. 1895). On the availability of damages in other states, see Ellickson, *supra* note 170, at 720-21.

neighborhood foreshadowed a substantial period of insecurity for the residents followed by no assurance of a satisfactory remedy.

Much of the city was affected by such potential threats. Horse-drawn transportation along the gridiron of streets was so ubiquitous that there were few locations in the city where the construction of a stable was obviously impractical for business reasons. Therefore, any threat to construct a livery stable had to be taken seriously by residential neighbors. Some people developed a regular practice of buying vacant lots in residential subdivisions, threatening to build a stable, and then extorting a steep price from the neighbors to be bought out. This became such a widespread practice that it became known as the livery stable scam, the history of which has been carefully chronicled by Andrew King.²²⁹

The Chicago Real Estate Board was offended by what it saw as this abuse of the free market system, but was reluctant to suggest that the government be given substantial discretion in the location of stables. Instead they proposed an ordinance prohibiting any new livery stables abutting or within 75 feet of any "residence street" unless the owners of all property within 600 feet gave their consent in writing.²³⁰ This ordinance was adopted in 1887²³¹ and eventually upheld by the Illinois Supreme Court in the case of *City of Chicago v. Stratton*.²³² The *Stratton* opinion established some legal principles that were later to be used by the United States Supreme Court²³³ and to cause great perplexity to future students and commentators.²³⁴ Faced with a seemingly unanswerable argument, based on prior precedent, that the ordinance constituted an unlawful delegation of legislative policy to the neighbors, the court nevertheless found a way to uphold the ordinance:

229. KING, *supra* note 143, at 245-48; see CHICAGO CITY COUNCIL, BUILDING DISTRICTS & RESTRICTIONS 16-17 (1917) [hereinafter COUNCIL].

230. KING, *supra* note 143, at 248. Ordinances requiring neighborhood consent had been used in Chicago to control the location of taverns, and landowners abutting streets were accustomed to being asked to consent to street car lines, but the livery stable ordinance was the first use of neighborhood consent to control land use. *Id.* at 250-54.

231. HUTCHISON, LAWS & ORDINANCES OF CHICAGO, § 2241, at 638-39 (1890).

232. 44 N.E. 853 (Ill. 1896).

233. See, e.g., *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928).

234. See Ernst Freund, *Some Inadequately Discussed Problems of the Law of City Planning & Zoning*, 24 ILL. L. REV. 135, 143 (1929); Howard L. McBain, *Law-making by Property Owners*, 36 POL. SCI. Q. 617, 628-29 (1921); Frank I. Michelman, *Political Markets & Community Self-Determination*, 53 IND. L.J. 145, 165 (1977).

As cities are constructed, the division of the territory is into blocks bounded by streets. The persons who will be injuriously affected by a livery stable, so kept as to be a nuisance, are those whose residences are in the same block where the stable is located. The prohibition against the location of a stable in a residence block is for the benefit of those who reside there. [Under the ordinance the lot owners] are not clothed with the power to locate livery stables, but are merely given the privilege of consenting, that an existing ordinance against the location of livery stable in such a block as theirs may not be enforced as against their block. They are simply allowed to waive the right to insist upon the enforcement of a legal prohibition which was adopted to their benefit and comfort.²³⁵

B. BLOCK VOTING

Actual application of the concept of neighbor approval was not so easy. Is land ownership or residency to be the criteria for voting? Can votes be purchased or must they be unconstrained by economic temptation? How is proximity to be measured? What percentage of approval should be required?²³⁶ These issues proved thorny, and remain so in those areas where frontage consents are still used.²³⁷ Chicago's neat division into rectangular blocks and parallel streets made systematic enactment and enforcement of frontage consent ordinances more workable than in many other places, and by 1905 the City was using a common system of frontage consents to regulate construction not only of stables but billboards, hospitals, gas reservoirs, blacksmiths, foundries, packing houses, rendering plants, tanneries, breweries, distilleries, junkshops, laundries, grain elevators and soap making plants.²³⁸

The frontage consent system had barely reached its peak before disillusionment with it set in.²³⁹ Scandals arose over the secret purchase

235. *Stratton*, 44 N.E. at 855. For a recent discussion of a somewhat comparable New York case from the same time period, see Judith A. Gilbert, *Tenements & Takings: Tenement House Department of New York v. Moeschel as a Counterpoint to Lochner v. New York*, 18 FORDHAM URB. L. REV. 437, 440 (1991).

236. See ELLICKSON & TARLOCK, *supra* note 155, at 299-304.

237. Under more recent Illinois cases, frontage consent procedures may be an invalid delegation of legislative power regardless of their form. *Drovers Trust & Savings Bank v. City of Chicago*, 165 N.E.2d 314 (Ill. 1960); *Lakin v. City of Peoria*, 472 N.E.2d 1233 (Ill. App. Ct. 1984).

238. KING, *supra* note 143, at 248-49.

239. *Id.* at 282-83.

of frontage consents in violation of a court decision holding that the purchase of their votes was equivalent to the bribery of legislators.²⁴⁰ Nevertheless, under pressure from neighborhood groups the city council kept creating additions to the list of uses subject to frontage consents and finally, over bitter opposition, adopted an ordinance requiring frontage consents for any retail store.

The ordinance was immediately challenged; plaintiffs noted that other state courts that considered frontage consent ordinances had frequently found them invalid.²⁴¹ The Illinois court now found itself in the uncomfortable position of being the leader in support of a new regulatory device. In 1912, while the case was pending before the Illinois supreme court, the Supreme Court of the United States held a Richmond frontage consent ordinance invalid.²⁴² The case was distinguishable because the ordinance had not used the waiver language that had allowed the *Stratton* court to find an absence of legislative delegation. Nevertheless, the case cast a great pall over the future use of frontage consents.²⁴³

The next year the Illinois Supreme Court deepened the pall by holding the retail consent ordinance invalid because the statute authorized only regulation of groceries and meat markets, not all retail stores. Moreover, the court said that even if the statute had delegated this authority to the city "it would not have the power to deprive a citizen of valuable property rights under the guise of prohibiting or regulating some business or occupation that has no tendency whatever to injure the public health or public morals or interfere with the general welfare."²⁴⁴ If residential property owners prefer not to have retail stores in their neighborhoods "it manifestly arises solely from aesthetic considerations" and thus cannot be sustained.²⁴⁵

240. *Doane v. Chicago City Ry.*, 45 N.E. 507, 511 (Ill. 1895). The court thus treated the property owners as "legislators" for this purpose but not as legislators in the *Stratton* opinion decided the next year.

241. See cases cited in Bettman, *supra* note 216, at 844 n.11.

242. *Eubank v. City of Richmond*, 226 U.S. 137 (1912).

243. KING, *supra* note 143, at 335.

244. *People ex rel. Friend v. City of Chicago*, 103 N.E. 609, 611 (Ill. 1913). Insofar as "morals" are concerned, compare the view of New York City's committee that advocated the use of zoning to separate residences and business districts: "Immediate and continual proximity to the moving picture show, dance hall, pool room, cigar store, saloon, candy store and other institutions for the creation and satisfaction of appetites and habits is not good for the moral development of the child." COMMISSION ON BUILDING DISTRICTS & RESTRICTIONS, FINAL REPORT 22 (1916) [hereinafter COMMISSION].

245. COMMISSION, *supra* note 244, at 21. Although some people still hoped to

C. NATURAL ZONING

The frontage consent defeats focused the attention of reformers on the "zoning movement," which swept the country in the years between 1909 and 1929.²⁴⁶ As in most cities, Chicago business and real estate leaders debated whether to support this new technique of dividing a city into zones and adopting separate land use regulations for the various zones instead of relying on the "natural zoning."²⁴⁷ Zoning proponents in Chicago received strong pressure from the neighborhoods to promote legislation that would encourage block-by-block uniformity of uses in the manner contemplated by frontage consent ordinances.²⁴⁸

Charles Edward Merriam led the attempt to draft state legislation that would authorize municipal zoning in Chicago. Merriam was both an alderman and a political science professor at the University of Chicago who worked closely with Park and the Chicago school of sociologists.²⁴⁹ Merriam was to become the primary author of both the first Illinois zoning law and the city's technical report that served as the foundation for that legislation.²⁵⁰ Merriam's report reflected the strong influence of Robert Park's ideas.²⁵¹ The inevitability of neighborhood change was accepted as a matter of course.²⁵² The

revive the frontage consent concept, *see* Comment, 10 ILL. L. REV. 306, 307 (1915), most public attention now turned to the new zoning movement. *See* KING, *supra* note 143, at 286.

246. Bettman, *supra* note 216, at 835; TOLL, *supra* note 134, at 192-93; SCOTT, *supra* note 129, at 152-61.

247. ELY & MOREHOUSE, *supra* note 215, at 85; *see* Power, *supra* note 219, at 642-59.

248. KING, *supra* note 143, at 364-66.

249. *See generally* BARRY D. KARL, CHARLES E. MERRIAM & THE STUDY OF POLITICS (1974). Merriam was a strong supporter of coordinated social science research and he worked closely with Park and the other Chicago sociologists in creating the Social Science Research Council. *Id.* at 123, 143-44; BULMER, *supra* note 183, at 133-34; HERBERT A. SIMON, CHARLES E. MERRIAM & THE "CHICAGO SCHOOL" OF POLITICAL SCIENCE 6-7, 9 (1987). Merriam became a member of the Natural Resources Planning Board when it was created during the 1930's. *Id.* at 263-83. Oliver S. Merriam, *Charles Edward Merriam, Jr.*, 48 A.P.W.A. REPORTER NO. 11, at 4-5 (1981).

250. CHARLES E. MERRIAM, CHICAGO: A MORE INTIMATE VIEW OF URBAN POLITICS 73-75 (1929); Merriam, *supra* note 146, at 284.

251. *See generally* COUNCIL, *supra* note 229.

252. "In a growing city there is of course continual change in the character of various sections." *Id.* at 18; *see also* WARNER, *supra* note 68, at 31. But Merriam believed that property values could be stabilized by slowing the rate of changes. COUNCIL, *supra* note 229, at 3; *see* KING, *supra* note 143, at 366-69. For a general discussion of the "property value" theory of zoning, *see* BABCOCK, *supra* note 203, at 116-20; WALKER, *supra* note 146, at 54.

report said that residential neighborhoods were inevitably doomed to decline because large residential homes were not adaptable for conversion to other uses.²⁵³ For these reasons, zoning districts were not intended to be permanent; rather the report assumed that neighborhoods would be held in residential use "until the land is ready or 'ripe' for industrial purposes. . . ," but it argued that with zoning the "pressure for unsanitary 'transition uses' will be greatly diminished and a far greater degree of stability secured than is possible now."²⁵⁴ The report accepted the theory of concentric zones by suggesting that residential areas would be subject to "progressively stricter limitations" on bulk and density as they proceeded outward from the center.²⁵⁵

The zoning bill originally drafted by Merriam proposed to limit the city's zoning power by requiring that the city give "reasonable consideration to the character of the district, its peculiar suitability for particular uses, the conservation of property values and the direction of building development to the best advantage of the entire city or village."²⁵⁶ This language was adapted from language that had been added to the New York City Charter in 1916, but it substituted "to the best advantage of the entire city or village" for New York's requirement that the zoning be "in accord with a well-considered plan."²⁵⁷

253. Merriam quoted at length from articles by University of Chicago social scientists in support of this point. COUNCIL, *supra* note 229, at 30-31; see Sophonisba Breckinridge & Edith Abbott, *Chicago Housing Problem*, 16 AM. J. OF SOC. 289 (1910).

254. COUNCIL, *supra* note 229, at 43. For similar views see Culver, *supra* note 215, at 209-11.

255. COUNCIL, *supra* note 229, at 33-34.

256. *Id.* at 11.

257. The New York Charter language was: "The board shall give reasonable consideration, among other things to the character of the district, its peculiar suitability for particular uses, the conservation of property values, and the direction of building development *in accord with a well-considered plan*" (emphasis added). Section 242b, *reprinted in* COMMISSION, *supra* note 244, at 46. Another section of the New York Charter contained somewhat similar language: "The board shall pay reasonable regard to the character of buildings erected in each district, the value of the land and the use to which it may be put to the end that such regulations may promote public health, safety and welfare and the most desirable use for which the land of each district may be adapted and may tend to conserve the value of buildings and enhance the value of land throughout the city." Section 242a, *reprinted in id.*, at 45. An amalgamation of language from these two sections was later incorporated in § 3 of the Commerce Department's Standard Zoning Enabling Act as follows:

Such regulations shall be made with reasonable consideration, among other

As eventually enacted the language of the statute became even more oriented toward the human ecologists' theories of "deterministic succession." The reference to the "peculiar suitability" of districts for certain uses was excised and the reference to the "character of the district" was changed to "existing conditions" so that as enacted it read:

[D]ue allowance shall be made for existing conditions, the conservation of property values, the direction of building development to the best advantage of the entire city or village, and the uses to which property is devoted at the time of the enactment of any such ordinance²⁵⁸

Thus any suggestion that each district might have a "character" or "peculiarities" was replaced by a purely factual analysis of existing conditions, a task the courts had already undertaken voluntarily for in nuisance and deed restriction cases as they searched for uniformity.

In an editorial the *Chicago Tribune* cheered the passage of the legislation and encouraged the city to adopt a zoning plan. "Chicago is a big place. There is room for everybody. There ought to be residence districts reserved for homes, and factory districts reserved for manufacturing."²⁵⁹ The vast area for Chicago's future expansion seemed to diminish any felt need for planning. Once zones were made more uniform, it was believed that the natural succession of neighborhoods could take its course as the city grew.

D. A MONOPOLY GAME

A desire to encourage uniform land uses within natural zones was also consistent with another concern that had been raised about

things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the municipality.

See ELLICKSON & TARLOCK, *supra* note 155, at 40-41. The Commerce Department's model law was not promulgated until 1922. See Newman F. Baker, *Zoning Legislation*, 11 CORNELL L.Q. 164, 175 (1926).

258. 1919 Ill. Laws § 1 (Senate Bill No. 125). A computerized word search turned up only one other state statute using the exact language of this part of the Illinois zoning statute, a Kansas billboard regulation law. KANS. STAT. ANN. § 19-2906 (1990). Coincidentally, perhaps, the Kansas Supreme Court is the only other state court that has used the *LaSalle Bank* standards as a basis for decision, although it has subsequently changed its position. See Mandelker & Tarlock, *supra* note 5, at 9 n.25.

259. *Zoning for Chicago*, CHI. TRIB., June 20, 1919, at 10. The actual adoption of zoning in Chicago was delayed until the legislature amended certain procedural aspects of the statute in 1921, but the language from the 1919 statute quoted in the text has never been modified.

early land use regulations in Illinois — the fear that they were motivated by a desire to protect the vested interests of existing businesses. If the city precluded new businesses of a particular type but allowed existing businesses to remain, one would naturally wonder whether existing businesses were being unfairly given a monopoly. One of Chicago's earliest municipal attempts at land use regulation had been struck down on this issue by the Illinois Supreme Court.²⁶⁰ By the 1920's, however, the courts of most states had accepted the view that the extreme hardship caused by the termination of existing businesses justified an exemption for them from new regulations.²⁶¹

The founders of the zoning movement worried about this issue, but believed it could be safely resolved by imposing restrictions on the enlargement, expansion or change in use of existing businesses; these restrictions, it was assumed, would eventually cause such businesses to wither away. The alternative of terminating existing uses seemed politically unacceptable.²⁶² Then a 1922 Illinois Supreme Court decision sent shock waves through the zoning movement by suggesting that any protection of existing uses was invalid as tending to create a monopoly.²⁶³ New York attorney Edward Bassett wrote that the Illinois court's reasoning would doom zoning, and he consulted with Chicago business leaders about the case.²⁶⁴

Advocates of zoning worried about the monopoly issue, but because the courts of most other states had been able to overcome doubts about this issue the cities felt confident that Illinois would

260. *Tugman v. City of Chicago*, 78 Ill. 405 (1875).

261. Bettman, *supra* note 216, at 850-51; John Mixon, *Jane Jacobs & the Law — Zoning for Diversity Examined*, 62 Nw. U. L. Rev. 314, 348-52 (1967).

262. See Note, *Amortization of Property Uses Not Conforming to Zoning Regulations*, 9 U. CHI. L. REV. 477 (1942).

263. *People ex rel. Roos v. Kaul*, 134 N.E. 740 (Ill. 1922). The Village of Forest Park had passed an ordinance regulating manufacturing facilities, relying on a statute which allowed such regulation but "shall not be construed to require the removal of any of the above enumerated buildings from any location which they may lawfully occupy at the time of the passage of any ordinance hereunder." The court held the statute and ordinance both invalid. "The cases . . . hold an ordinance which prohibits one citizen from conducting a particular kind of business in a certain locality and permits another to engage in the same character of business in the same locality is void." *Id.* at 742. The court said the statute "is unreasonable, and tends to create a monopoly." *Id.* at 742-43. After this decision Chicago speeded up work on its zoning ordinance. See KING, *supra* note 143, at 395.

264. EDWARD M. BASSETT, *ZONING: THE LAWS, ADMINISTRATION & COURT DECISIONS DURING THE FIRST TWENTY YEARS* 91 (1940); KING, *supra* note 143, at 395-96.

follow suit.²⁶⁵ But when a test case on the validity of zoning reached the Illinois Supreme Court, the court issued a draft opinion saying that a law that prohibited new uses in an area where similar existing uses were allowed to remain violated the state constitution's prohibition against special legislation.²⁶⁶ Only if an ordinance limited each district to a specific use or uses could it be upheld.²⁶⁷

The cities filed petitions for rehearing and, in a striking parallel to the *Euclid* case in the United States Supreme Court a year later, the court reconsidered its initial opinion.²⁶⁸ In December, 1925, the court issued a new opinion that upheld the cities' zoning both in concept and as applied.²⁶⁹ Although the court relented from its initial desire for complete uniformity of uses within districts, it did so only grudgingly, saying that "the classification [among districts], as a whole, must be fair, but an absolute identity of treatment of particular parcels of land is not required."²⁷⁰ It quoted the statutory requirements that due allowance be made for existing conditions and the direction of building development. It also said that "[a]n arbitrary creation of districts, without regard to existing conditions or future growth and development, is not a proper exercise of the police power and is not sustainable."²⁷¹ But it distinguished its earlier "monopoly" opinion by saying that the city's community-wide zoning plan created other districts for the factory that the plaintiff sought to build. "No monopoly is fostered or created," said the court, "by requiring stores and factories to be located in districts allotted to them."²⁷²

265. See FRANK B. WILLIAMS, *THE LAW OF CITY PLANNING & ZONING* 284-87 (1922).

266. The original opinion in *City of Aurora v. Burns* can be found only at 57 CHI. LEGAL NEWS, Feb. 26, 1925, at 251; see NEWMAN F. BAKER, *LEGAL ASPECTS OF ZONING* 144 (1927); KING, *supra* note 143, at 401-02.

267. The court said that the "fact that the Zoning act requires that due allowance be made in zoning ordinances for existing conditions and that an ordinance shall not deprive the owner of an existing property of its [existing] use . . . does not, however, render the act void." The court said that many if not all cities could adopt a zoning ordinance meeting those requirements even though "the districts would not be as large or uniform as might be desired . . ." 57 CHI. LEGAL NEWS, Feb. 26, 1925, at 252. Compare the early position of the California Supreme Court in *Ex parte Quong Wo*, 118 P. 714 (Cal. 1911). See Pollard, *supra* note 224, at 17-25.

268. For a discussion of the reargument in *Euclid*, see 1 JAMES METZENBAUM, *THE LAW OF ZONING* 116-20 (1930).

269. *City of Aurora v. Burns*, 149 N.E. 784 (Ill. App. Ct.) *aff'd*, 319 Ill. 84 (1925); see also *Deynzer v. City of Evanston*, 149 N.E. 790 (Ill. 1925); BAKER, *supra* note 266, 119-20.

270. *Burns*, 319 Ill. at 98; see BASSETT, *supra* note 264, at 92.

271. *Burns*, 319 Ill. at 87.

272. *Id.* at 98 (distinguishing *People ex rel. Roos*, 134 N.E. 740 (Ill. 1922)). As

The approval of zoning by the United States Supreme Court in the following year²⁷³ gave further assurance that the zoning movement had achieved its objective. Additional favorable opinions by the Illinois Supreme Court during the remaining years of the 1920's reinforced the popular belief that the court had overcome its earlier distrust of municipal regulation.²⁷⁴

Public disillusion with zoning soon set in. The support of zoning by reform elements depended on the city's adherence to a set of rules that prevented new nonconformities within districts to the extent reasonably feasible. If the cities were to grant rezonings at the request of landowners too freely, the stabilizing function of zoning would evaporate.

Ernst Freund, a careful and respected observer of the zoning process, thought that exactly this type of disintegration was beginning to take place as early as 1929. Freund, who was a colleague of Charles Merriam on the political science faculty of the University of Chicago, wrote that he was disturbed at the "increasing flow of amending ordinances." He encouraged the creation of a system by which landowners could challenge unfair zoning in court instead of before the City Council. Although landowners should not be able to "black-mail" their neighbors with livery stable-type scams, Freund argued, neighborhoods do change. Neighborhood change is often

serious and insidious, [and] anticipates an inevitable future downward development, and means that a farseeing owner gets out or accommodates himself without undue loss. To the neighbors who have more optimism or less perception, or who lack the same opportunity, that owner seems grossly unfair, but it may well be that he stands justified in the eyes of the impartial bystander. It is very likely that from a series of adjudications his [proposed change] will emerge as fair rather than as unfair.

He suggested that a system of judicial relief similar to that used to invalidate restrictive covenants in changing neighborhoods could be

early as 1887 the court in dicta had suggested that a city had the power to "designate the particular quarter of the city" within which slaughterhouses might operate. *City of Chicago v. Rumpff*, 45 Ill. 90, 99 (1867).

273. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). For a thorough analysis of the *Euclid* case see Williams, *supra* note 168.

274. On balance, the court's early decisions were sufficiently favorable to zoning that in 1929 an Illinois treatise writer could say that "the general tendency is to uphold even debatable ordinances." REEVE, *supra* note 169, at 80; see, e.g., *Village of Western Springs v. Bernhagen*, 156 N.E. 753 (Ill. 1927).

"made applicable to the ultimate decline of areas originally developed under zoning restrictions."²⁷⁵

In 1930 the Illinois Supreme Court responded along the lines Freund had suggested. Chicago had amended its zoning ordinance by changing the text to increase the height limit (66 2/3% higher) for property that fronts on three streets and is across from a park. This amendment had been artfully designed solely to let John Cuneo build a tall building on the northeast corner of Michigan Avenue and Randolph Street, and was repealed after Cuneo's building permit was issued. The owners of other downtown buildings objected. The court held the amendment invalid, quoting the statutory requirement that "due allowance shall be made for existing conditions, the conservation of property values, the direction of building development to the best advantage of the entire city, village or incorporated town, and the uses to which property is devoted at the time of the enactment of any such ordinance,"²⁷⁶ and citing evidence that the adoption of a general height limit of 264 feet for the loop in 1923 had "stabilized real estate values," making it possible for property owners to develop and finance buildings knowing a fair return on capital could be obtained. A 440 foot building would have "a prejudicial effect upon and a large differential renting advantage over surrounding or other business property . . . ," without any evidence that existing conditions, conservation of property values, or the direction of building development had been taken into consideration.²⁷⁷ The court said that zoning "must be impartially applied as to all properties similarly situated,"²⁷⁸ re-

275. Freund, *supra* note 234, at 148-49. Freund had worked with Merriam on the unsuccessful attempt to persuade the legislature to grant Chicago a city charter in 1907. See Ernst Freund, *Some Legal Aspects of the Chicago Charter Act of 1907*, 2 ILL. L. REV. 427 (1908). He was a good friend of both Merriam and Park. See BULMER, *supra* note 182, at 41. He had a joint appointment to the law school faculty and was a highly productive scholar, authoring some 20 books and pamphlets and 85 articles. JOHN C. REITZ, *THE INFLUENCE OF ERNST FREUND ON AMERICAN LAW* 3 (forthcoming 1992) (delivered at a symposium on Sept. 11 - 14, 1991, in Bonn, Germany). His highly regarded treatise, *THE POLICE POWER* (1904), had frequently been cited by the Illinois Supreme Court. See, e.g., *North American Ins. Co. v. Yales*, 73 N.E. 423, 425 (Ill. 1905); *People v. John Doe of Rosehill Cemetery Co.*, 166 N.E. 112, 114 (Ill. 1929). It should be noted that Freund was also living in a neighborhood where single-family homes were being converted to fraternities and other institutional uses. TOLL, *supra* note 134, at 267.

276. *The Michigan-Lake Bldg. Corp. v. Hamilton*, 172 N.E. 710, 714 (Ill. 1930).

277. *Id.* at 715.

278. *Id.* at 716. Two decades later another study of zoning in Chicago characterized it as a "tremendous number of amendments enacted under a system devoid

flecting the court's continuing desire to promote neighborhood uniformity.²⁷⁹

The court's reliance on the statutory conditions to strike down the amendment began the chain of cases from which the *LaSalle Bank* standards evolved.²⁸⁰ "Existing conditions" were evidenced by the

of planning considerations." Comment, *Zoning Amendments & Variations Among Zoning Districts*, 1954 U. ILL. L. REV. 470, 475 (1953); see also Harland Bartholomew, *The Zoning of Illinois Municipalities*, ILL. MUN. REV. 221 (1938).

279. In commenting favorably on the case, Chicago's Assistant City Attorney said that zoning is intended "to stabilize and not upset values. . . . Zoning is a community effort and is designed to benefit the civic group, not the individual." Newman F. Baker, Note, *Zoning Ordinances — Amendment*, 25 ILL. L. REV. 817, 820 (1931).

280. Factor 1 was also discussed in *Forbes v. Hubbard*, 180 N.E. 767, 771 (Ill. 1932), in which the court, in determining whether an ordinance was based on the public good, considered "the conditions as they exist." This concept soon evolved, and in *Anderman v. City of Chicago*, 40 N.E.2d 51, 53 (Ill. 1942), the court stated, "[i]n determining whether the invasion of property rights under a purported police power is unreasonable and confiscatory . . . [t]he character of the neighborhood and the use to which nearby property is put, may also be taken into consideration." Similar language was used in such cases as *Braden v. Much*, 87 N.E.2d 620, 624 (Ill. 1949), and *Hannifin Corp. v. Berwyn*, 115 N.E.2d 315, 319 (Ill. 1953), and later became the first factor in the *LaSalle Bank* standards.

Factor 2 also appeared in *Forbes v. Hubbard*, 180 N.E. 767, 773 (Ill. 1932), where the court wrote "the degree in which the values incident to the property are diminished by the provisions of the zoning ordinance must always be considered." This language was used again in cases like *Anderman v. City of Chicago*, 40 N.E.2d 51, 53 (Ill. 1942) and *Galt v. Cook County*, 91 N.E.2d 395, 399 (Ill. 1950), and eventually was incorporated into the *LaSalle Bank* case as the second factor.

Factor 3 was first used in *City of Aurora v. Burns*, 149 N.E. 784 (Ill. 1925), where the court stated "[t]he question is not whether we approve the ordinance under review, but whether we can pronounce it an unreasonable exercise of power, having no rational relation to the public health, morals, safety or general welfare." Similar language was used in cases such as *State Bank & Trust Co. v. Village of Wilmette*, 193 N.E. 131, 133 (Ill. 1934) and *Krom v. City of Elmhurst*, 133 N.E.2d 1, 7 (Ill. 1956), and became the third factor of the *LaSalle Bank* standards.

Factor 4 appeared in the case of *Evanston Best & Co. v. Goodman*, 16 N.E.2d 131, 133 (Ill. 1938). The Illinois Supreme Court noted that "the profit that would accrue to individual property owners if zoning restrictions were removed must be weighed against the detriment to the public welfare that would result from such action." Similar language was used in *Quilici v. Village of Mount Prospect*, 78 N.E.2d 240, 242 (Ill. 1948), and *Midland Electric Coal Corp. v. Knox County*, 115 N.E.2d 275, 280-81 (Ill. 1953), and eventually became the fourth factor of the *LaSalle Bank* standards.

Factor 5 was the basis for the classic case of *Tews v. Woolhiser*, 185 N.E. 827 (Ill. 1933), in which the court struck down Winnetka's attempt to impose residential zoning on a small parcel located between a busy highway and a commuter rail line.

uniform height of existing buildings that complied with the underlying ordinance.²⁸¹ "Conservation of property values" was emphasized by the court when it discussed the value of stabilizing real estate values through uniform heights.²⁸² These two criteria, which eventually became the axioms on which the *LaSalle Bank* standards were based, directly reflected the human ecologists' "natural areas" theory: Zoning should not attempt to change the character of neighborhoods; it should reinforce rather than alter the existing character of the neighborhood, and by doing so it will enhance overall property values.²⁸³

An ordinance "which zones property to a use to which it cannot be put" was held to be invalid. *Id.* at 830. This idea also appeared in cases such as *Dunlap v. City of Woodstock*, 91 N.E.2d 434, 436 (Ill. 1950), where the court, in considering whether a local zoning ordinance was reasonable, asked "[i]s appellants' property suitable for single-family residence for which it was zoned?" Similar ideas were expressed in cases like *Chicago Title & Trust Co. v. Village of Franklin Park*, 122 N.E.2d 804, 806 (Ill. 1954) and *Petropoulos v. City of Chicago*, 125 N.E.2d 522, 525-26 (Ill. 1955), and later developed into the fifth factor of the *LaSalle Bank* standards.

Factor 6 is the least frequently used of the six standards, but it had already been cited in *Forbes v. Hubbard*, 180 N.E. 767, 773 (1932); see also *Krom v. City of Elmhurst*, 133 N.E.2d 1, 5 (Ill. 1956), where the court articulated that the "property . . . has little desirability for residential purposes . . . [and] would in all probability degenerate into permanent vacant property which would be unsatisfactory both for aesthetic and tax considerations." The idea that zoning should not cause property to remain vacant eventually became the sixth factor in the *LaSalle Bank* standards.

281. *Michigan-Lake Bldg. Corp. v. Hamilton*, 172 N.E. 710, 714 (Ill. 1930). Compare the earlier case of *Minkus v. Pond*, 158 N.E. 121 (Ill. 1927) (The apartment zoning proposed by the landowner would have been invalid because it would destroy neighborhood's "past and intended character."). Even in states where the courts usually defer to local zoning choices, the consistency of a development proposal with surrounding uses is often a major factor in zoning decisions. Charles M. Haar et al., *Computer Power & Legal Reasoning: A Case Study of Judicial Decision Prediction in Zoning Amendment Cases*, AM. B. FOUND. RES. J. 651, 718 (1977).

282. *Michigan-Lake*, 172 N.E. at 715. The court scoffed at the idea that a building's frontage on three streets and a park indicated consideration of "the direction of building development." *Id.*

283. See *supra* notes 217-19. *Phipps v. City of Chicago*, 171 N.E. 289, 293 (Ill. 1930); *Kennedy v. City of Evanston*, 181 N.E. 312, 314-15 (Ill. 1932). Illinois is not unique in its emphasis on existing conditions, but in no other state has the emphasis been so dominant. Many other courts often rely on existing development patterns as a benchmark from which to begin in their evaluation. MANDELKER, *supra* note 145, at 54, 84-85. The pattern of Illinois court decisions in the years immediately after the *Burns* decision suggested that the court would tend to look unfavorably on zoning amendments that affected individual parcels, whether initiated by the landowners or by others. See, e.g., *Western Theological Seminary v. City of Evanston*, 156 N.E. 778 (Ill. 1927); see also *Welton v. Hamilton*, 176 N.E. 333, 337-38 (Ill. 1931) (holding invalid on unlawful delegation grounds the power of a board of appeals to grant

Other Illinois cases made it obvious that these principles would allow zoning to be overturned by developers as well as objectors. For example, in the 1932 case of *Forbes v. Hubbard* the court held invalid River Forest's attempt to limit one side of a street to single family homes when the other side was occupied by existing businesses.²⁸⁴ The key factor to be considered said the court, was "conditions as they exist."²⁸⁵

It is not the object of this paper to review the application of the *LaSalle Bank* standards to individual cases after 1932. The court has appeared to tilt at times toward the developers, at other times toward local government,²⁸⁶ throughout it has continued to use the same two axioms as the bases of decisionmaking: uniformity of neighborhoods, and support of property values until the inevitable downward spiral demands judicial intervention. The effect of these decisions has been to enhance peoples' ability to rely on the anticipated value of property. A neighborhood that succeeds in avoiding the first change of use within its boundaries can rely on protection against dramatic intrusions of unwanted uses, but once a pattern of change develops the court will reinforce that pattern by ensuring that similarly located property can share the effects of that change.²⁸⁷

By promoting equal treatment of comparable property and preventing drastic reduction of property values the court has performed one of the key regulatory functions of a commodity exchange: Encouraging the predictability of the valuation of the commodity. Given Illinois' landscape and history, this desire to foster the use of land as

variations based on "practical difficulties and unnecessary hardship"); Ernst Freund, *Zoning — Power of Board to Vary*, 26 NW. U. L. REV. 575 (1932). The court seemed to become less concerned with this issue after 1932. See Note, *supra* note 262.

284. *Forbes v. Hubbard*, 180 N.E. 767 (Ill. 1932).

285. *Id.* at 771; see also *People ex rel. Deitenbeck v. Village of Oak Park*, 163 N.E. 445, 447 (Ill. 1928) ("immediate neighborhood . . . is devoted to commercial pursuits" so residential zoning invalid); *Spies v. Board of Appeals*, 169 N.E. 220 (Ill. 1929).

286. The Illinois Supreme Court's attitude toward zoning became more negative during the depression. See Richard F. Babcock, *The Illinois Supreme Court & Zoning: A Study of Uncertainty*, 15 U. CHI. L. REV. 87, 87-89 (1947). It then turned more positive again in the 1950's. See Richard F. Babcock, *The New Chicago Zoning Ordinance*, 52 NW. U. L. REV. 174, 175 (1957).

287. Once single family homes became converted to multiple family use, whether lawfully or not, the courts assumed that a natural change had taken place which the court was bound to reinforce. See, e.g., *Westfield v. City of Chicago*, 187 N.E.2d 208 (Ill. 1962); see also WARNER, *supra* note 68, at 35.

a commodity is quite understandable. Whether the premises on which it is based remain valid is a story for another day.

VI. EPILOGUE

A. A BROADER VIEW

The purpose of this paper is to search for the history of the *LaSalle Bank* standards, not to argue their merits. In closing, however, it is worth noting that the Illinois Supreme Court's recent decisions show some indication that the court may be moving away from the axioms on which the *LaSalle Bank* standards were based.

One indication of a new attitude is found in the court's decisions involving the public trust doctrine. The court has been one of the nation's leaders in forging a broad interpretation of this doctrine. It has tried to ensure that submerged lands are not merely another source of capital that the Illinois legislature can use in the same way that it sold land to finance canals and railroads a century and a half ago. Perhaps one day the court will take the next step and give consideration to the "natural use" theory of property endorsed by the neighboring court to the north.²⁸⁸

Also, in the field of environmental law, the Illinois Supreme Court tried for twenty years to construe the Environmental Protection Act so that regional pollution control facilities would receive the statewide perspective that such environmental issues obviously require.²⁸⁹ It was the legislature, which kept amending the Act to demonstrate an unequivocally parochial viewpoint, that finally forced the court to accept a construction that effectively places regional pollution control facilities at the mercy of their immediate neighbors.²⁹⁰

Of even more direct relevance, perhaps, is the court's 1991 opinion in *Beverly Bank v. Illinois Department of Transportation*, in which the court refused to apply the *LaSalle Bank* standards to

288. See, e.g., *People ex rel. Scott v. Chicago Park Dist.*, 360 N.E.2d 773 (Ill. 1976).

289. *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972); see David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 HARV. ENVTL. L. REV. 311, 357-59 (1988).

290. *O'Connor v. City of Rockford*, 288 N.E.2d 432 (Ill. 1972); *Carlson v. Village of Worth*, 343 N.E.2d 493 (Ill. 1975); *County of Cook v. John Sexton Contractors Co.*, 389 N.E.2d 553 (Ill. 1979); *County of Kendall v. Avery Gravel Co.*, 463 N.E.2d 723 (Ill. 1984).

statewide legislation imposing tight restrictions on the erection of buildings in floodways.²⁹¹ Whether or not the *Beverly Bank* opinion suggests any loss of support by the court for the universality of the *LaSalle Bank* standards, it at least offers both the state legislature and local legislatures some interesting drafting opportunities for avoiding their application.²⁹²

B. HUMAN ECOLOGY REVISITED

In the 1930's the charitable foundations that had funded the work of the human ecologists turned their attention elsewhere, perhaps

291. See *Village of Carpentersville v. Pollution Control Bd.*, 553 N.E.2d 362 (Ill. 1990).

292. *Beverly Bank v. Illinois Dep't of Transportation*, 579 N.E.2d 815 (Ill. 1991). The case involved Illinois flood control legislation that prohibited all new residential construction in 100-year floodways within the territory served by the Northeastern Illinois Planning Commission. The plaintiff was a landowner to whom the application of this statute caused substantial hardship. Moreover, there was a history of pre-statutory permit activity that might reasonably have been expected to elicit some sympathy about the validity of the statute's application if the court had used the Illinois *LaSalle Bank* standards. Plaintiff argued that the *LaSalle Bank* standards should be applied, but the state argued that such standards were appropriate only for challenges to land use regulations as applied, not facial attacks. The state contended "that when a court hears a challenge to a zoning ordinance as it is applied to a particular piece of property, the aggrieved property owner is usually complaining of what she or he alleges is a discriminatory abuse by a local public body. In such a situation, the principle considerations involve the existing uses and zoning of nearby properties . . . [and] whether the burden on the property owner bears a substantial relation to the public welfare." *Id.* at 820. A unanimous supreme court agreed with the state. "In the instant case," said the court, "plaintiff's challenge is, in fact, a facial one. It is the change from the prior law, which permitted construction of a new residence in the 100-year floodway when no adverse flood impact was shown, to the current law, which prohibits all construction of new residences in the 100-year floodway, which plaintiff argues is unreasonable." *Id.* Because the prohibition against residential construction is "without exception and is applied in a completely nondiscriminatory manner: defendant is required to refuse to issue or extend a permit to begin construction of a new residence in the floodway," therefore it can only be challenged on its face. *Id.*

If the court were to review, as plaintiff urges, the [*18] constitutionality of section 18g as it applies to a particular piece of property by engaging in an ad hoc factual determination, the court would, in effect, be holding the class-wide prohibition on new residential construction unconstitutional on its face for failing to provide for a variance or special use. The court may not judicially create exceptions to this prohibition by engaging in individual factual evaluations with regard to each parcel of land which lies within the floodway in each instance in which a property owner desires to build a house.

Id. at 820-21.

because a dispassionate, fatalistic view of cities was less welcome in the decade of the great depression and the "new deal" than it was in the boom years that preceded it.²⁹³ The professional literature began to contain negative critiques of the Chicago School of Human Ecology in the 1930s,²⁹⁴ and today the movement is largely of historical interest.²⁹⁵ Nevertheless, the contributions that Robert Park made to urban studies should not be lightly disregarded. He initiated the first comprehensive empirical approach to the study of cities. He brought sociology out of the ivory tower and into the streets. Although some of his theories may seem strange to us today, they attracted interest that stimulated valuable research into the way people function in cities.²⁹⁶

Like the other ideas of the human ecologists, the axioms on which the *LaSalle Bank* standards were based deserve reexamination today. First, the social desirability of uniform neighborhoods characterized by a single land use is more controversial today than when Park propounded its inevitability. Americans increasingly question whether such neighborhoods are consistent with current lifestyles.²⁹⁷

293. MATTHEWS, *supra* note 182, at 183.

294. HOYT, *supra* note 69, at 73-76; *see* BERRY & KASARDA, *supra* note 181, at 3; Davie, *supra* note 174, at 159.

295. ALIHAN, *supra* note 183; BRIAN GOODALL, *THE ECONOMICS OF URBAN AREAS* 109-11 (1972); JAMES A. QUINN, *HUMAN ECOLOGY* 295-310 (1950); THOMLINSON, *supra* note 154, at 144-45; Bruce London & William G. Flanagan, *Comparative Urban Ecology: A Summary of the Field*, in *THE CITY IN COMPARATIVE PERSPECTIVE* 41 (John Walton & Louis N. Mascotti, eds. 1976); GERALD D. SUTTLES, *THE SOCIAL CONSTRUCTION OF COMMUNITIES* 15, 24-25 (1972). *But see* AMOS H. HAWLEY, *HUMAN ECOLOGY* 235 (1950). Some sociologists continue to use the term "human ecology" but with quite a different content. *See* BERRY & KASARDA, *supra* note 181, at 12-13; SIDNEY M. WILLHELM, *URBAN ZONING & LAND-USE THEORY* 200-16 (1962); Feagin, *supra* note 202, at 77-79. One indication of the obscurity of the concept today is that real ecologists have begun using the term "human ecology" without fear of causing confusion. PAUL R. EHRLICH ET AL., *HUMAN ECOLOGY* (1973). The Ehrlichs' ideas of "human ecology" as a desirable pattern of land use are about as far removed from those of Park and Burgess as one can get; they emphasize "personal options" for access to "a variety of landscapes, living accommodations, career possibilities, cultural environments, recreational opportunities, interpersonal relationships, degrees of privacy and so forth." These options have value, he argued, even if not exercised or if exercised only by a few: "[D]iversity on a small scale (individual choice) promotes stability on a large scale (society as a whole)." *Id.* at 261-62; *see also* Otis D. Duncan, *From Social System to Ecosystem*, 31 *ECOLOGY INQUIRY*, No. 2, at 140, 142-44 (1961).

296. WHITE, *supra* note 144, at 262-63.

297. *See generally* Mixon, *supra* note 261. *See also* DOLORES HAYDEN, *REDESIGNING THE AMERICAN DREAM* 173-195 (1984); CONSTANCE PERIN, *EVERYTHING IN ITS*

Second, the assumption that residential neighborhoods inevitably decline in value until they are "ripe" for conversion to another use seems anachronistic in a society that argues about the issue of "gentrification" and converts loft buildings to apartments.²⁹⁸

Third, a century ago most people believed that the maximization of real estate values benefitted the nation's economy. The contrary views of David Ricardo and Henry George seemed inapplicable to a country in which land was so plentiful. Today, however, it is increasingly apparent that the supply of land suitable for development is no longer endless. Today there is not even agreement among land economists about whether the ideal land use pattern would be one that *maximizes* or *minimizes* aggregate land values.²⁹⁹ Although there has been no loss of support for the right to buy and sell land freely, the emphasis on its commodity value may have misled millions of homeowners into thinking that real estate could somehow escape the inevitability of economic cycles, and has certainly encouraged a tendency to gloss over major ecological differences in the carrying capacity of various parcels.³⁰⁰

PLACE 129-209 (1977); Calthrope, *supra* note 19; ROBERT FISHMAN, *BOURGEOIS UTOPIAS* 206 (1987); VANCE, *supra* note 203, at 393; JANE JACOBS, *THE ECONOMY OF CITIES* 247 (1969). Even in Park's day there was not unanimous acceptance of homogeneous zones. See Jacob L. Crane, Jr., *Progress in the Science of Zoning in ANNALS OF THE AMER. ACAD. POL. SCI.* 195-96 (1931) (Separation of residences from jobs makes transportation "more difficult, irksome and expensive.").

298. Today it is generally accepted that "the urban growth process is not mechanistic." BARLOWE, *supra* note 197, at 247; GRAHAM HALLETT, *URBAN LAND ECONOMICS* 120-21 (1979). Compare the simple patterns of Burgess' model to the current ideas of chaos-theorists. JOHN BRIGGS & F. DAVID PEAT, *TURBULENT MIRROR* 155-62 (1989); JAMES GLEICK & ELIOT PORTER, *NATURE'S CHAOS* 16 (1990). *But see* RICHARD L. MORRILL, *THE SPATIAL ORGANIZATION OF SOCIETY* 188 (1974).

299. GOODALL, *supra* note 295, 94-95; ALONSO, *supra* note 152, at 11. In a 1927 case the court had interpreted "conservation of property values" to mean the prevention of a decrease in the existing value of neighboring property. It invalidated a Springfield zoning ordinance's minimum height standard on the grounds that it was designed to increase the value of neighboring property rather than conserve the existing value. *Brown v. Board of Appeals*, 159 N.E. 225, 227 (1927).

300. As Christine Boyer put it, zoning "fell the victim of reified application: the splitting of quality into quantity and the rapid facilitation of capital exchange." Urban land policy became dominated by the "economic need to create exchangeable parcels of land, marked and coordinated the universal application of a zoning law. . . . Nothing was left of the spatial quality and uses of land in the American city except that which could be defined as common and characteristic to each circulating and marketable parcel." BOYER, *supra* note 135, at 154. For a study of suburban homeownership that concludes that the acquisition of a home is a "poor vehicle for upward mobility," see MATTHEW EDEL ET AL., *SHAKY PLACES* 7 (1984).

Finally, of all the theoretical assumptions on which the *LaSalle Bank* standards were based, probably none is more dubious today than the assumption that the important impacts of any particular land use were those that were perceived by its immediate neighbors to be nuisances. This assumption, based in nineteenth century nuisance law, reflected the primitive state of scientific knowledge of the time.³⁰¹ For example, nineteenth century courts took judicial notice of the "fact" that unpleasant odors were unhealthful to the neighbors, a theory that modern medical science would find amusing.³⁰² The unhealthful qualities of today's air are often caused by the cumulative impact of thousands of small traffic-generating land development decisions, none of which is perceived by the neighbors as the cause of the smog that plagues the area.³⁰³ Can a system of law so heavily grounded in nineteenth century ideas of nuisance be made relevant to modern life?

C. HOUSE OF CARDS

Despite my doubts about the continuing validity of the axioms on which the *LaSalle Bank* standards were based, one cannot read Illinois history from the period in which they were created without being caught up in the excitement of the times. Chicagoans did use human ingenuity to "commodify" the resources of the midwest in a way that benefitted not just Chicagoans but all the producers of the resources. Chicagoans did convert a flat, swampy prairie into a great city through the use of engineering marvels, architectural masterpieces, and a talent for attracting the best in culture, entertainment and (belatedly) sports.

Given today's economic times, however, it seems appropriate to close with a cautionary quote from Homer Hoyt,³⁰⁴ who wrote his

301. See, e.g., *City of Chicago v. Rumpff*, 45 Ill. 90, 97 (1867) (If one slaughterhouse is authorized by an ordinance it could not be "unhealthy or offensive" to have other slaughterhouses in the neighborhood.). The theory of "moral environmentalism," which blamed the immediate physical environment in which people lived for much of their behavior, was popular during this period. SCHULTZ, *supra* note 48, at 112-14 (1989).

302. See, e.g., *Chicago Packing & Provision Co. v. City of Chicago*, 88 Ill. 221 (1878); see also *Mixon*, *supra* note 261, at 346.

303. See Arnold W. Reitze, Jr., *A Century of Air Pollution Control Law: What's Worked; What's Failed; What Might Work*, 21 ENVTL. L. 1549, 1569-75 (1991). Professor Epstein agrees that private law solutions are not sensible when the problem results from the cumulative effect of many small polluters. Richard A. Epstein, *Regulation & Contract in Environmental Law*, 93 W. VA. L. REV. 859, 871 (1991).

304. HOYT, *supra* note 54.

famous study of *One Hundred Years of Land Values in Chicago* in the year 1933. After chronicling the five booms and busts that the city's economy had witnessed, he concluded that, "those who have witnessed the fifth act of this century-long drama almost doubt the evidence of their senses." The 1920's, he said, resembled the post-Civil War "gilded age" with striving for wealth by the masses and "financial manipulations on a grand scale" that dazzled the public. "Then the whole structure toppled down like a house of cards, and today we look back on it as a bubble or a mirage."³⁰⁵

305. *Id.* at 232; see WALT W. ROSTOW, *THE STAGES OF ECONOMIC GROWTH* 76-79 (1968). As Justice Stevens recently put it, "an occasional echo of 1933 has sounded an alarming note" reminding us that "risk is a characteristic of a free economy." John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13, 15-16 (1992).